No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 10, 2015
CERTIORARI GRANTED APRIL 4, 2016

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DISTRICT COURT
ARAPAHOE COUNTY, COLORADO

CASE NO. 07CR2311

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
08/03/2007	Affidavit For Arrest Warrant Felony Complaint Filed With Affidavit For Arrest Warrant By DA /HLS
09/11/2009	Minute Order: Parties announce ready 4 day trial. Will call/May call; Exhibit list due 9/18. Voir Dire: 45 minutes. Opening statements: 20 minutes. One alt: #6. Defense objects to juror questions—overruled by court. Matter recalled Defense willing to toll speedy (court has 2 cases announce ready) speedy 4/5/10. JTRL reset on 2/23/10 at 8:30. Trial call on 2/12/10 at 11:00 /NJA
02/23/2010	Minute Order: Jury Trial Day 1. Judge: Antrim for Judge Wheeler. Clk: AJB. Rpter: C. Troyanek. Motion in Limine: No reference to DUI but statements by DEFT about drinking will be allowed. Jury Selection. Case is recalled after lunch and jury selection continues. Jury is selected at 2:45 pm. Matter moved to Div. 206 Judge Wheeler presiding. Opening statements. /AJB

DATE	DOCKET TEXT
02/24/2010	Minute Order: Jury Trial Day 2. Judge: Wheeler Clk: AJB Rpter: B. Sloan. Present: DDA Krusey; DEFT on bond w/attys M. Meyrick/K.Cherry. PPL Call: [J.C.]; [Ch.M.]; [Ca.M.] Jury adjourned for lunch. [Ca.M.] recalled. Timothy Murphy Deputy Chris Gulli Deputy Jeremy Nesvuld Deputy Rick Haight /AJB
02/25/2010	Minute Order: Jury Trial Day 3. Judge: Wheeler Clk: AJB Rpter: B.Sloan. Present: DDA Krusey; DEFT on bond w/attys M. Meyrick / K.Cherry. Parties discuss jury instructions. DEF mtn for judgment of acquittal. Court denies. Parties make objections to jury instructions. DEF calls: Mr. Chavez / AJB Court reads jury instructions Closing arguments. Jury adjourns for deliberations at 1130A Jury excused for the day and will return tomorrow at 830AM /AJB
02/26/2010	Minute Order: Jury Trial Day 4. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DD Krusey; DEFT on bond w/attys M. Meyrick / K.Cherry Jury returns for deliberations at 830AM. Jury question – Jury is hung. Court gives modified Allen instruction. Jury has reached a decision on 3 of the 4 counts at 4:00 COUNT 1-ATTEMPT SEX ASSAULT, F5-MISTRIED

DATE	DOCKET TEXT
	COUNT 2-SEXUAL CONTACT-NO CONSENT, M1-GUILTY COUNT 3-HARASSMENT, M3-GUILTY COUNT 4-HARASSMENT, M3-GUILTY Presentence report ordered. Matter set for sentencing on the MISD Counts on 5/3/10 at 8:30. DEF to remain on bond with consent of surety. Due to time of day—Court accepts verbal consent. Written consent to be filed by 3/1/10 FOTH: ROCP Jury instructions Verdict forms Jury questions /NJA
03/11/2010	Motion ATY/Meyrick, Michael William DEF/RST/ Pena-Rodriguez, Miguel Angel Motn For Jury Contact Info And Motn For Extension Of Time For A New Trial Under Rule 33 Std 206 3/11/10 /HLS
03/12/2010	Order Order Re Deft's Motion For Jury Contact And For Enlargement Of Time For Motion For New Trial-preliminary Order. Copy Of Order To DA And M Meyrick /NJA
03/23/2010	Motion ATY/Meyrick, Michael William DEF/RST/ Pena-Rodriguez, Miguel Angel Motn For Disclosure Of Jury Info Std 206 3/31/10 /HLS
04/16/2010	Response People's Response To Defendant's Motn For Disclosure Of Jury Information Std 206 4 23 10 /SAH

DATE	DOCKET TEXT
04/28/2010	Order Order Re Deft's Motion For Disclosure Of Jury Information-1. Copy of Written Order To Da And Defense Csl Meyrick /NJA
05/03/2010	Minute Order: Sentencing. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DDA Krusey; DEFT on bond w/attys M. Meyrick and K. Cherry Court provides juror information to K. Cherry. DEF CNSL moves to continue sentencing due to appellate deadline. Matter still outstanding is the motion for new trial. Court order sets out specific methods for fact finding. PPL do not object to continuance but makes a record regarding juror contact. By DEF CNSL. Court explains that the first stage of order is a fact finding matter. Matter set for status: 6/3/10 at 8:30A. Bond continues. FLG: Setting slip /AJB
06/01/2010	Filing Other DEF1/Pena-Rodriguez, Miguel Angel Submission Of Affidavits /FLN
06/03/2010	Minute Order: Status Conf. Judge: Wheeler Clerk: NJA J. Scott-Reporter Present: Kursey-DDA; DEFT with CSL Michael Meyrick and K. Cherry DA to file response brief by 6/11/10 (end of day); reply brief due by 6/16/10. Matter set for continued status 6/24/10 at 8:15. DEFT's bond continued /NJA

DATE	DOCKET TEXT
06/24/2010	Minute Order: Status Conf. Judge: Wheeler Present: Kursey-DDA; DEFT on bond with CSL M. Meyrick / K. Cherry Court has received affidavits from jurors and briefs from CSL. Court will issue written order. Matter set for further HRG on 7/20/10 at 1:30 for 1 HR. Bond continued FOTH: Setting slip /NJA
07/19/2010	Order Order Re Deft's Motion For Disclosure Of Jury Information III /NJA
07/20/2010	Minute Order: Status. Judge: Wheeler Clerk: NJA R. Sloan-Reporter Present: Kursey-DDA; DEFT with CSL M. Meyrick / K. Cherry After discussion with CSL, court will contact juror and ask that he come in on 8/12/10 at 8:30. Bond continued. /NJA
08/12/2010	Minute Order: Hearing. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DDA Edson; DEFT on bond w/M. Meyrick / K. Cherry Juror [H.C.] has been subpoenaed. Court outlines course of questioning. The only issue will be why he did not disclose his previous law enforcement experience. Mr. [C.] sworn in. Court questions witness. DEF CNSL questions witness. Witness released. DEF CNSL will submit a written supplement due 9/3/10. /AJB

DATE	DOCKET TEXT
09/07/2010	Filing Other ATY / Meyrick, Michael William Defendant's Brief In Support Of Motion For A New Trial Std 206 9 9 1- /SAH
09/24/2010	Response People's Response To Defendant's Brief In Support Of His Motion For A New Trial Std 206 9 27 10 /SAH
09/30/2010	Order Order Re: Defendant's Motion For A New Trial-final Order. Based On Factual Analysis, The Court Denies The Deft's Motion For A New Trial. /MS
11/23/2010	Minute Order: Sentencing. Judge: Wheeler Clerk NJA R. Sloan – Reporter Present: J. Edson-DDA; DEFT with CSL Meyrick / Cherry DEFT previously found Guilty after Trial as to Count 2-Sexual Contact-No Consent 18-3-404, M1; Count 3 Harassment 18-9-111(1)(a), M3 and Count 4 Harassment 18-9-111(1)(a), M3. Count 1 Sex Assault on Child 18-3-405, F4 (Jury hung on this Count) – DA will dismiss Count 1. Defense CSL is requesting a stay until ruling from Court of Appeals – DA objects to request. Court will proceed to sentencing today. Court will sentence the DEFT as follows: As to Count 2 – DEFT sentenced to 2 years probation As to Counts 3 and 4 DEFT sentenced

DATE	DOCKET TEXT
	to 2 probation counts 2, 3, 4 all run concurrent Conditions: Attend & complete programs on sexual boundary violations, dynamics of consenting and non consenting relationships, impact of alcohol use on sexual behavior and education RE how the assault impacted the victim through empathy training and Victim harm recognition, no contact with Victims or their families; no contact with female children under 18 year (not including DEFT's child) unless and until approved by treatment provider and Probation; no limitation on contact with male children; abstain alcohol and illegal drugs; alcohol eval and treatment as recommended. Register as sex offender; genetic marker testing (if required for registration); no requirement of "no denial." Sex offender surcharge. No objection to transfer of probation to Denver. DEFT to report to Probation. FOTH: ROCP Presentence Report (Sealed) /NJA

COLORADO COURT OF APPEALS

CASE NO. 2011CA34

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
01/10/2011	Notice of Filing Notice of Appeal
11/17/2011	Opening Brief
05/31/2012	Answer Brief
07/16/2012	Reply Brief
11/08/2012	Opinion Issued – Mandate Pending

COLORADO SUPREME COURT

CASE NO. 2013SC09

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
01/04/2013	Petition for Writ of Certiorari
08/19/2013	Order of Court Granting Petition for Writ of Certiorari
09/29/2013	Opening Brief
04/14/2014	Answer Brief
05/27/2014	Reply Brief Motion or Request – Oral Argument Motion or Request – Excess Pages
05/18/2015	Opinion
06/10/2015	Petition for Rehearing
06/15/2015	Order of Court Denying Rehearing

COMPLAINT AND INFORMATION

CHARGES

COUNT 1: SEXUAL ASSAULT ON A CHILD – VICTIM LESS THAN 15, 18-3-405(1) (F4) [04041]

COUNT 2: UNLAWFUL SEXUAL CONTACT – NO CONSENT, 18-3-404(1)(a) (M1) [04121]

COUNT 3: HARASSMENT – STRIKE, SHOVE OR KICK, 18-9-111(1)(a) (M3) [27101]

COUNT 4: HARASSMENT – STRIKE, SHOVE OR KICK, 18-9-111(1)(a) (M3) [27101]

COUNT 5: DRIVING UNDER THE INFLUENCE, 42-4-1301(1)(a) (M) [73121]

Warrant Requested Bond requested: $6000

Bond set at: $10,000 CSP

Judge: /s/ [Illegible] 8/3/07
Signature Date

[District Court Seal]

Carol Chambers, District Attorney for the Eighteenth Judicial District, of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the county of Arapahoe.

COUNT 1: SEXUAL ASSAULT ON A CHILD – VICTIM LESS THAN 15 (F4)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully, feloniously, and knowingly subjected [Ca.M.], not his spouse, to sexual contact and the victim was less than fifteen years of age and the defendant was at least four years older than the victim; in violation of section 18-3-405(1), C.R.S.

COUNT 2: UNLAWFUL SEXUAL CONTACT – NO CONSENT (M1)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully and knowingly subjected [J.C.] to sexual contact, and the defendant knew the victim did not consent; in violation of section 18-3-404(1)(a), C.R.S.

COUNT 3: HARASSMENT – STRIKE, SHOVE OR KICK (M3)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ, with intent to harass, annoy, or alarm [Ca.M.], unlawfully struck, shoved, kicked, touched, or subjected the victim to physical contact; in violation of section 18-9-111(1)(a), C.R.S.

COUNT 4: HARASSMENT – STRIKE, SHOVE OR KICK (M3)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ, with intent to harass, annoy, or alarm [J.C.], unlawfully struck, shoved, kicked, touched, or subjected the victim to physical contact; in violation of section 18-9-111(1)(a), C.R.S.

COUNT 5: DRIVING UNDER THE INFLUENCE (M)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully drove or operated a motor vehicle while under the influence of alcohol or drugs or both; in violation of section 42-4-1301(1)(a), C.R.S.

All offenses against the peace and dignity of the People of the State of Colorado.

Carol Chambers
District Attorney,
By /s/ [Illegible], # 30949
Deputy District Attorney

ROGER LANDEIS, being duly sworn upon oath says:

That the facts stated in the foregoing felony complaint/information, hereto attached are true and that the offenses therein charged were committed of this affiant's own personal knowledge.

/s/ Roger Landeis
ROGER LANDEIS

Juror Questionnaire – Please Print Answers

You will help save time selecting a jury when you complete this questionnaire completely and accurately. Do not show this questionnaire to anyone or discuss it with other jurors. If you need more space for your answers, please ask for an additional sheet of paper. Do not write on the back of the questionnaire. The completed questionnaire is NOT A PUBLIC RECORD. Press hard to imprint on all 3 copies.

1. Your full name: [H.L.C.]
2. Area of Denver you are from: Aurora
3. Where were you born and raised? Denver
4. Marital Status? M Number of children? 2 Children's ages and occupations: 41 – Educator 39 – Crafts
5. Employment (former employment if retired): Contracts
6. Spouse's employment (former employment if retired): Educator
7. Your level of education, including any legal training you may have had: Post Grad
8. Friends or relatives in law enforcement? Friends
9. Have you or a family member ever had a good or bad experience with a police officer? No If yes, please explain:
10. Have you ever been a witness in court? Yes When/type of case: 1992 Civil

11. If you have been a juror before, what type of case was it? Yes Traffic

12. Have you or anyone you know, ever been accused/convicted of a crime or a victim of a crime? Yes If yes, please explain: Daughter – No registration or insurance

13. Have you, or anyone you know ever been the victim of or accused of incest, sexual assault, or rape? Were children involved? No

    If yes, please explain.

14. If your answer to #13 needs to be further discussed, would you prefer to discuss this matter in private with the Judge and attorneys?

15. Do you have any specialized knowledge in the area of sexual assault/abuse, including any groups, associations that assist persons in this area? No If yes, please explain.

16. Would your answers to questions 12, 13 and/or 15 impact your ability to serve on a jury in a case, which may involve an allegation of sexual assault? No If yes, please explain.

17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? No If yes, please explain.

18. Further information you would like to add:

    I swear or affirm that the above information is true to the best of my information and belief.

    s/ *[H.L.C.]*
    Juror name:

COURT REPORTER'S TRANSCRIPT
February 23, 2010

The Trial in this matter commenced at 8:39 a.m. on Tuesday, February 23, 2010, before the HONORABLE MARILYN K. ANTRIM, Judge of the District Court, and a jury of twelve.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

APPEARANCES

FOR THE PEOPLE:	AMANDA K. KRUSEY, ESQ. Registration No. 41094
FOR THE DEFENDANT:	MICHAEL W. MEYRICK, ESQ. Registration No. 29748
	KELLY C. CHERRY, ESQ. Registration No. 40105

* * *

[7] MS. KRUSEY: Your Honor, I actually just have a procedural question. I have never done a trial in front of Your Honor, so just the Court's preference as to–

THE COURT: Yes, we should talk about several things. What's your question?

MS. KRUSEY: Just during the jury selection, if we do want to make a challenge for cause, how the Court prefers us to do that. I know some judges prefer to wait until the [8] end of our voir dire, or if we do it immediately. I know some judges don't like to tip off other jurors what's going to get them off.

THE COURT: After you have finished your voir dire, you and whoever is going to be doing voir dire for Defense will come forward. I'll ask if you have any challenges for cause. We do this on the record, so there will be a contemporaneous record filed. And then we'll address the issue, or I may ask the juror additional questions. I'm not going to spend a great deal of time rehabilitating jurors because you can sometimes convince people to say what you want them to say but that doesn't mean you've changed their mind.

We do not call jurors by their name in here. We call them by their juror number. You will be given a seating chart with everyone's juror number on it, and I anticipate that – in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it.

MR. MEYRICK: He is in the country legally, Your Honor.

THE COURT: All right. Are there any other issues?

MS. KRUSEY: I don't believe so.

* * *

[14] (The prospective jurors entered the courtroom, and the following proceedings were conducted in the presence and hearing of the prospective jurors)

THE COURT: Good morning. I am going to explain to you what's happening here and the procedures that we're [15] going to use to pick the jury. The case we are about to try is a criminal case the Prosecution has brought in the name of the People of the State of

Colorado. In this case, the Prosecution is represented by Ms. Krusey.

Ms. Krusey, would you please stand and introduce yourself.

MS. KRUSEY: Good morning, ladies and gentlemen of the prospective jury panel. My name is Mandy Krusey. I'm a deputy district attorney with the Arapahoe County district attorney's office.

THE COURT: And the Defendant is represented by Mr. Meyrick.

Mr. Meyrick, would you please stand and introduce the people at your table.

MR. MEYRICK: Good morning. My name is Michael Meyrick, and with me is co-counsel, Kelly Cherry.

MS. CHERRY: Good morning.

MR. MEYRICK: And Miguel Pena, who is the Defendant in this case.

THE COURT: Thank you.

The charges against the Defendant are contained in what is called a Complaint and Information, and that simply describes the charges against the Defendant. It is not evidence of anything. In this case, the Complaint and Information reads as follows: Count 1, sexual assault on a [16] child, victim less than 15; Count 2, unlawful sexual contact, no consent; Count 3 and 4, harassment.

As I mentioned a minute ago, the charges against the Defendant are not evidence. By pleading not guilty, the Defendant has said he did not commit the crimes with which he is charged. He is presumed innocent; therefore, the Prosecution has the burden of proving the guilt of the Defendant beyond a reasonable doubt.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all the evidence or lack of evidence in the case. It is a doubt which is not a vague, speculative, or imaginary doubt but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves. The jury selected will decide if the Prosecution has proven beyond a reasonable doubt that the Defendant has committed the crimes with which he is charged.

There will be 12 jurors and 1 alternate selected to try this case. The people selected will consider all the evidence produced during the trial. It will be the sole responsibility of the jurors selected to try the case to determine the facts from all of the evidence received during the trial. This will require your close attention, absolute honesty, impartiality, and sound judgment.

It will not be necessary to keep the jurors [17] together at noon or at night. If you are selected to be a juror, you will be allowed to leave the courthouse during the noon recess and go home at night. Jurors and potential jurors must not discuss the case among themselves or with anyone else until instructed to do so by this Court.

You must not read, view, or listen to any reports about the case in the press, on the radio, television, or other media. That means you cannot Google, you cannot MapQuest, you cannot – I don't know all those things; but if it's on the computer, don't do it. You should also not form or express any opinion about the outcome of this matter until the Court instructs you to begin your deliberations.

I am going to now explain to you briefly the method we'll use in selecting a jury to try this case. As you can see, some of you have been called forward initially and others of you are sitting in the back, and I'm going to urge those of you sitting in the back to still pay close attention because you may be called forward before the jury-selection process has been completed. In a minute, I am going to give you your oath as jurors in this case. I'm going to ask you to stand and raise your right hand. I'll read the oath, and then I'll ask you to say, I will.

After the oath is administered, the Court and each attorney may ask questions of you concerning your ability to be fair and impartial jurors. You should answer fully all [18] questions asked by the attorneys or by me. Even though you may not be called forward initially, you should still listen closely to all the questions and answers that are given.

Okay. Would you stand now and raise your right hand?

(The prospective jurors were duly sworn by the Court.)

THE COURT: Thank you very much.

Now I'm going to read a list of grounds that will disqualify you to be a juror in this case. If any of these grounds apply to you, please raise your hand.

First of all, are you related to the Defendant or to the attorneys?

(No response.)

THE COURT: No hands are raised.

Do any of you have a relationship of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent, or are you a member of the household or a partner in business with or a surety on any bond or obligation–

(Prospective Juror Number 36 entered the courtroom.)

THE COURT: Did we lose someone?

THE CLERK: We did, Judge.

THE COURT: All right. Sir, at this time, I'm [19] going to ask you to stand and raise your right hand, please. (Prospective Juror Number 36 was duly sworn by the Court.)

THE COURT: Thank you very much.

As I was saying, are any of you related to the Defendant or the attorneys?

(No response.)

THE COURT: No hands are raised.

Do any of you have a relationship of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent, or are you a member of the household or a partner in business with or a surety on any bond or obligation with or for the Defendant?

(No response.)

THE COURT: No hands are raised.

Are any of you now or have you been a party in a civil lawsuit involving the Defendant or complained against or been accused by the Defendant in a criminal prosecution? (No response.)

THE COURT: No hands are raised.

Have any of you been a grand juror or a witness at a former trial or proceeding arising out of the same factual situation involving the Defendant?

(No response.)

THE COURT: No hands are raised.

[20] Were any of you a witness in any matter related to the crime or its prosecution?

(No response.)

THE COURT: No hands are raised.

Do any of you have a personal or financial interest in the outcome of the case? By "interest," I mean a financial or other personal interest apart from any interest you might have as a citizen of a city, county, or state.

(No response.)

THE COURT: No hands are raised.

Do any of you have a feeling for or against the

Defendant or the Prosecution?

(No response.)

THE COURT: No hands are raised.

* * *

[51] Now, the next question is a very difficult one because I read you the charges in this case and everyone has very strong opinions about child sex assault. And I am sure that I speak for everyone when I say, no one here thinks it's a good thing, but I want you to understand that just because there are charges doesn't mean that the Defendant is guilty. I told you earlier, he's presumed innocent, and that presumption stays with him until the conclusion of all the evidence,

when the jury goes back into the jury room and then deliberates.

So if I have a jury seated in the jury box and I say to the district attorney, Call your first witness, and she says, We rest, I think we all agree that the district attorney has not met her burden and that your verdict would be not guilty. And I have this long preamble because the next question is going to raise a lot of issues.

So what I'm going to do is read the question, and then instead of asking you to raise your hand, I'm going to say to you, Understanding now that the Defendant is presumed [52] not guilty, understanding the district attorney has to convince you of his guilt beyond a reasonable doubt, if you still think you want to speak to us, let's talk about it privately.

And the question is this: Is there anything about the nature of this case which would, in and of itself, influence any of you at arriving at a verdict? Now, this is one of those questions, I think you understand, we need to hear from you privately, so we won't – I won't ask you to raise your hands.

* * *

[53] THE COURT: Okay. And, again, one of those questions we'd want to speak to you about privately. If you're selected to be a juror in this case, is there any reason why you would not be able and willing to render a verdict solely on the evidence presented at trial and the law that I give to you and disregard any other ideas, notions, or beliefs about the law you may have encountered? We'll speak to you privately if you can't say that you could do that.

Now, is there anything else that somebody wants to talk to me about and we haven't discussed it at this time?

(No response.)

* * *

[124] MR. MEYRICK: Good afternoon, ladies and gentlemen, and thank you for your attention. The good news about all this is that, because I go second, a lot of these questions have already been asked, so I don't have to go through all of this again, so this shouldn't take very much time.

But I do have a few questions because, as some of you answered some of the questions earlier, that gave rise to more questions in my mind. So I just want to cover that because it's really important that we establish that the people that we select to do this today can be fair, and that's all we're asking for.

And to pick up close to where Ms. Krusey left off, Juror Number 3, there was a question about a paper that you had written, I guess, in college on something that was related to this subject; is that right?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: And I think that when she asked you if you thought that that would have an effect on you in this case, you just kind of hesitated a little bit and said, I don't think so, but I – that's what concerns me a little bit. So can you tell me a little more about – not so much the subject matter but whether or not you think that that would have an effect on your decision in this case?

[125] PROSPECTIVE JUROR NUMBER 3: It shouldn't have any effect–

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 3: – because any decision I would come to would have to be after I have heard evidence and things.

MR. MEYRICK: Right. So, I mean, as you do research on papers and so on and so forth, the facts are all different in different cases, right?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: And so the facts in this case are not going to be the same as the facts in anything, perhaps, that you have researched, right?

PROSPECTIVE JUROR NUMBER 3: Right.

MR. MEYRICK: And so you would be able to set that aside and just go by what you hear for the facts in this case?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: Okay. Good. Thank you. Thank you for that.

And, Juror Number 12, you're going to – you're going to hear the judge tell you – whether it's this judge or another judge, some judge is going to tell you that the Defendant has a right to testify in the case. He also has the right not to testify; and if he chooses not to testify, [126] then you can't hold that against him. Does that present a problem for you?

PROSPECTIVE JUROR NUMBER 12: No, not at all.

MR. MEYRICK: Why do you think that is?

PROSPECTIVE JUROR NUMBER 12: Well, I mean – so, obviously, that is the law; and he, obviously, has that right; and he can choose – actually, that means he hasn't done anything incorrect or wrong, and so I guess I wouldn't – I wouldn't judge him differently–

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 12: – whether he chooses to or not.

MR. MEYRICK: Okay. Does anybody disagree with that? Because some people do have a problem with that. Some people would think that, well, you know, I think that if I were in his shoes and I were charged with something, I'd want to get up there and say I didn't do it. Does that – does anybody feel that way? Does – I mean, it's not an uncommon feeling.

(No response.)

MR. MEYRICK: And, Juror Number 44, how do you feel about that?

PROSPECTIVE JUROR NUMBER 44: Well, it doesn't matter what – in my opinion, it doesn't matter what I would do in his – or the Defendant's position. I am to sit and [127] listen to both sides. And so the bottom line is, if it's within the law and he chooses not to do it, then I still have to have an open mind.

MR. MEYRICK: Right. And, I mean, if – if he chose to testify, would you listen to what he had to say and, perhaps, wonder, well, I wonder if he's just saying that to just kind of save his own hide, or what would you think?

PROSPECTIVE JUROR NUMBER 44: Me?

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 44: I would treat him, in this case, just like another witness.

MR. MEYRICK: Right. But, I mean, he could be in the position that, no matter what he did, people would be questioning what he did because, if he took the stand and testified and people were wondering, well, I wonder if he's just saying that to save him – save his own hide, or if he chose not to testify, then he's sort of in a bad position that, no matter what he does, people are going to question why.

PROSPECTIVE JUROR NUMBER 44: Well, obviously, people are questioning or he wouldn't be in the position he's in today.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 44: It's not our responsibility to wonder. It's our responsibility to listen [128] and then render a judgment based upon consultation with the peers that you're with and everybody's opinion, and you mold together, as I understand the system, and come out with one verdict.

MR. MEYRICK: Okay. And does anybody disagree with that in either the back of the room or in this panel up in front? Does anybody have a problem with that at all?

(No response.)

MR. MEYRICK: Okay. Thank you.

Number 14. I noticed on your questionnaire about your job, and so I wanted to go into that a little bit. Do you feel that your position or your job would hinder you in any way in being fair about this process?

PROSPECTIVE JUROR NUMBER 14: No.

MR. MEYRICK: Okay. Because in your job, you see people that have been witnesses in these types of cases; is that right?

PROSPECTIVE JUROR NUMBER 14: Correct.

MR. MEYRICK: And do you also see people who have been accused of these things?

PROSPECTIVE JUROR NUMBER 14: I do.

MR. MEYRICK: Okay. And do you think that you can listen to the facts of the case and come to some conclusion that's fair based on the evidence in this case?

PROSPECTIVE JUROR NUMBER 14: Yes, I do.

[129] MR. MEYRICK: Okay. Do you have any question about that whatsoever?

PROSPECTIVE JUROR NUMBER 14: No.

MR. MEYRICK: Okay. Thank you.

And, Juror Number 15, I think when you were describing earlier for us that you saw – you saw an incident take place that eventually became the subject of some court proceeding; is that right?

PROSPECTIVE JUROR NUMBER 15: Correct.

MR. MEYRICK: And, apparently, you saw that differently from how other people saw it or how other people may have related that to the court, right?

PROSPECTIVE JUROR NUMBER 15: Right.

MR. MEYRICK: So you understand that people can perceive things differently, right? They can watch the same thing and perceive them differently?

PROSPECTIVE JUROR NUMBER 15: Right.

MR. MEYRICK: Do you think that people, based on your experience, can exaggerate?

PROSPECTIVE JUROR NUMBER 15: Yes. Yeah, they can.

MR. MEYRICK: And why do – and why would they exaggerate, do you think?

PROSPECTIVE JUROR NUMBER 15: I don't know. To – I don't know.

[130] MR. MEYRICK: There may be any number of reasons, right?

PROSPECTIVE JUROR NUMBER 15: Right. Yeah, there could be any number of reasons.

MR. MEYRICK: Okay. Is that something that you could watch for in testimony in order to determine what kind of weight you would give it?

PROSPECTIVE JUROR NUMBER 15: Yeah.

MR. MEYRICK: Would you have a problem with that?

PROSPECTIVE JUROR NUMBER 15: No.

MR. MEYRICK: Okay. Thank you.

And, number 16, I think that you made the statement earlier that, well, if somebody is under oath, then they would be telling the truth; is that right?

PROSPECTIVE JUROR NUMBER 16: Yes, sir. I would.

MR. MEYRICK: You would. Does that mean that everybody –

PROSPECTIVE JUROR NUMBER 16: No.

MR. MEYRICK: – who is under oath always tells the truth?

PROSPECTIVE JUROR NUMBER 16: No, absolutely not.

MR. MEYRICK: And there may be, in fact, varying degrees of that, right, of what that truth is?

PROSPECTIVE JUROR NUMBER 16: Oh, yeah. I mean, definitely, I would say. Are you asking me similar to what [131] you were asking her?

MR. MEYRICK: Yes. Right. Right.

PROSPECTIVE JUROR NUMBER 16: Yeah. There's gonna be different perceptions, yeah, I think, of what happened, and I–

THE REPORTER: I'm sorry. I couldn't hear that.

PROSPECTIVE JUROR NUMBER 16: I agree with her. I said, I agree with her. I think, yeah, you've got to – you've got to watch, you know. You've got to pay attention to what people are saying, see how they're saying it, you know, what kind of tone they're using, actions. You gotta kind of feel out what they're saying.

You've got to be able to feel them out, do I feel that they're telling the truth. I would have to say, if I feel – do I feel like they're telling the truth. You know, they're under oath, but people do lie. It's just a fact of life, period. So, yeah, I think people, you know, can play with the truth, or they can manipulate the way they want it to come out.

MR. MEYRICK: Okay. So – and to follow up on that for just a minute, I mean, there may be – there may be a perception that somebody's trying to relate that's different from somebody else's perception of the same thing?

PROSPECTIVE JUROR NUMBER 16: Yeah.

MR. MEYRICK: So in their mind, they're telling [132] the truth, right?

PROSPECTIVE JUROR NUMBER 16: Yeah. In the Defendant's mind, he's telling the truth, and the witnesses, you know, they're telling the truth. So you've got to come to that as – as 44 said, you know, as a group, we've got to come to a decision, you know, based on – that's why we have 12 people -

MR. MEYRICK: Right.

PROSPECTIVE JUROR NUMBER 16: – or 13 people, so we can get that – get it out on the table and chop it up and dice it up.

MR. MEYRICK: And there may be things that you have to – you have to look at to determine what weight – not so much whether somebody is actually telling the truth or not telling the truth – but what weight you would give to some particular account, right?

PROSPECTIVE JUROR NUMBER 16: I do agree.

MR. MEYRICK: And, I mean, if, for example, the issue were identification, then the things that you would look for are what?

PROSPECTIVE JUROR NUMBER 16: Identification of what?

MR. MEYRICK: A person.

PROSPECTIVE JUROR NUMBER 16: A person?

MR. MEYRICK: Yes.

[133] PROSPECTIVE JUROR NUMBER 16: So if someone was drinking and they thought they saw some guy do it and it was – you know, are they inebriated? There's a lot of things – there's a lot of issues.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 16: That's the way I see it.

MR. MEYRICK: How the identification is made?

PROSPECTIVE JUROR NUMBER 16: Yeah, how the process – I mean, are you in a dark room? Do you have night-vision goggles on? I mean, that's – you know, are you inebriated? There's a lot of – there's definitely a lot going on there, for sure.

MR. MEYRICK: Okay. Thank you.

And, Juror Number 17, we've already heard from the judge about the presumption of innocence, that the Defendant is presumed innocent. Now, I know that you related that you had some experience through someone that you knew that had some problems with the law, and you thought that he got what he deserved.

PROSPECTIVE JUROR NUMBER 17: Absolutely.

MR. MEYRICK: But let me ask you this, though. Do you have a problem with presuming somebody innocent to begin with?

PROSPECTIVE JUROR NUMBER 17: Do I have a problem [134] presuming someone to be innocent to begin with?

MR. MEYRICK: Yes

PROSPECTIVE JUROR NUMBER 17: No.

MR. MEYRICK: And making the State prove that case beyond a reasonable doubt?

PROSPECTIVE JUROR NUMBER 17: They would have to prove it beyond a reasonable doubt.

MR. MEYRICK: Okay. Is there anybody who disagrees with that and thinks that, well, if you got charged with something, you must have done something wrong? Is there anybody who feels that way? Because that is a common feeling among a lot of people; that, you know, the police don't just indiscriminately go out and arrest people. Does that present a problem for you, that – that, you know, down deep, he must have done something because, otherwise, he wouldn't be arrested, he wouldn't be here? Anybody?

(No response.)

MR. MEYRICK: Okay. Number 26.

PROSPECTIVE JUROR NUMBER 26: Sure.

MR. MEYRICK: When – when we talk about beyond a reasonable doubt, can you, generally, tell me what that means to you from a layman's perspective? What's beyond a reasonable doubt to you?

PROSPECTIVE JUROR NUMBER 26: Beyond a reasonable doubt is that he actually committed the crime. You know, [135] I – I wasn't there, so I don't know. I'd have to hear the witnesses and their statements, and then – well -

MR. MEYRICK: Well, if it came down to maybe he did and maybe he didn't, what – what's your verdict in that case? If it came down to, well, you know, there's some indication here that looks bad for him, other things look good for him, what's your verdict if it's maybe?

PROSPECTIVE JUROR NUMBER 26: What's my verdict?

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 26: You know, it's hard to say. I'd have to hear a lot of – a lot of testimony.

MR. MEYRICK: I know, and it's difficult, and I don't like to put you in this spot of trying to – you know, one thing that we can't do too much is get into the facts of the case in the selection process, and that's a little bit of a hindrance because we're asking you questions that are sort of hypothetical, but – but what I'm wondering from you is what you think that standard means, beyond a reasonable doubt. What does that – what does that mean to you?

PROSPECTIVE JUROR NUMBER 26: Man, I – it's hard to say.

MR. MEYRICK: It is hard.

PROSPECTIVE JUROR NUMBER 26: Well –

MR. MEYRICK: Is that – anybody else who thinks that they may have even a definition of what that is, beyond [136] a reasonable doubt?

Yes. And it's Juror Number 30?

PROSPECTIVE JUROR NUMBER 30: Thirty.

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 30: Basically, everything would have to – everything would have to point to him being guilty. If they couldn't prove that he was guilty with all the corroborations of the witnesses or whatever evidence was available and his testimony, then you'd have to say not guilty.

MR. MEYRICK: Okay. And that's – thank you. And that's – that's what I was getting to. This is – you know, there are differences between civil cases and criminal cases. This is not a civil case. This is a criminal case, you see. In a civil case, it's 51 percent, you know, one side or the other, but that's not the case in a criminal case, and I just wanted to make sure that everybody understood that, okay?

Now – and I just have one last question to the general panel, and this is the most important question of all because, a lot of times, we – you know, we ask

these questions but we miss that one question that you've got in the back of your mind. And so I want to ask you, as a panel generally, is there anybody here who thinks for some reason, whether or not it's been discussed already, that this is simply not a good case for them to be a fair juror?

[137] (No response.)

MR. MEYRICK: Thank you.

That's all I have, Your Honor.

THE COURT: Was there a hand?

MS. KRUSEY: Yes.

MR. MEYRICK: Was there a hand? I'm sorry.

PROSPECTIVE JUROR NUMBER 39: Just the scenario.

MR. MEYRICK: That you've discussed?

PROSPECTIVE JUROR NUMBER 39: Yeah.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 39: It's just weird, you know –

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 39: – until it happens to you.

MR. MEYRICK: That we talked about?

PROSPECTIVE JUROR NUMBER 39: Yeah.

MR. MEYRICK: Okay. Thank you.

THE COURT: Approach, please, Counsel.

(The following proceedings were conducted at the bench out of the hearing of the prospective jurors)

THE COURT: Do you pass the panel for cause?

MR. MEYRICK: I do, Your Honor.

THE COURT: Thank you. Step back.

* * *

[140] MS. KRUSEY: The People will waive, Your Honor.

THE COURT: All right. To the folks in the jury-panel box, you are the ones who are going to be the panel that hears this case. This is your last opportunity. If there is something you've been thinking about that we should know, something you haven't shared because you didn't really think you would be back there or any reason why you can't or don't want to serve on this panel, please tell us now.

* * *

[144] THE COURT: Now, for the folks in the back over here, again, you are likely to be the jurors in this case. This is your last opportunity to tell us whatever you want to tell us about your service as jurors in this case.

(No response.)

[145] THE COURT: To the rest of the folks in the room, thank you very much for your service. You have provided your jury service for this year, and you are free to go down and check out with the jury commissioner's office, and that's the room where you came in first thing this morning. So please stand.

(The prospective jurors exited the courtroom.)

THE COURT: Thank you. I'm going to swear you in now as jurors to hear this case, and then Matt is going to take you into the jury room and talk to you for a few minutes. When you come out, you're going to come into Courtroom 206, and that is where you will be jurors in the case. So would you please raise your right hand.

(The jury panel was duly sworn by the Court.)

THE COURT: Thank you very much.

(The jury exited the courtroom, and the following proceedings were conducted out of the presence and hearing of the jury:)

THE COURT: Have a seat. The reason we're going to use the 207 jury room is, it has access to the front hall so the staff doesn't have to go out and let the jury members in. It's just a lot easier for staff, and it won't affect the trial at all because, instead of coming through that door, they'll just go around and into the next door. Your client isn't in custody, so that won't be a big issue.

[146] Batson challenges. Do you have a Batson challenge, Counsel?

MS. KRUSEY: No, Your Honor.

MR. MEYRICK: I do not.

THE COURT: All right. Is there anything else that we need to address before you go next door?

MS. KRUSEY: Nothing from the People.

MR. MEYRICK: Nothing from the Defendant, Your Honor.

THE COURT: All right. Thank you all for coming in, and good luck in the trial to everybody.

COURT REPORTER'S TRANSCRIPT
February 23, 2010

The Trial in this matter commenced at 2:57 p.m. on Tuesday, February 23, 2010, before the HONORABLE JOHN L. WHEELER, Judge of the District Court, and a jury of twelve.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

APPEARANCES

FOR THE PEOPLE:	AMANDA K. KRUSEY, ESQ. Registration No. 41094
FOR THE DEFENDANT:	MICHAEL W. MEYRICK, ESQ. Registration No. 29748
	KELLY C. CHERRY, ESQ. Registration No. 40105

* * *

[4] THE COURT: Thank you. Please be seated.

Good afternoon, ladies and gentlemen. My name is John Wheeler, and I am the district court judge in Division 206.

* * *

[7] During any break that we take – and I will explain this to you in detail now and then refer to it much more briefly later, but I like to get this out of the way right up front. During any break that we take – whether it is simply to go back for a few minutes, go back for a 20-minute break or a lunch break or an

overnight break – during that time, you may not discuss this case among yourselves.

In criminal cases in Colorado, the jury is not allowed to discuss the case until charged with deliberation. That is at the very end of the case. Not only may you not discuss it among yourselves, of course, you may not discuss [8] it with any friends, family, relatives, anyone that may ask you about the case who is a complete stranger, husbands, wives, children, grandparents. You simply can't talk about this case with anyone. It's not their business. It is your business and your business only.

Finally, all of that comes to the fact that you may not make your own minds up about any material fact in this case until the case is completely finished, and I will discuss what we are going to be doing here for the next few days so you'll understand when that will come.

I've got some cough drops here.

JUROR NUMBER 23: It's asthma, breathing problems.

THE COURT: Okay.

JUROR NUMBER 23: There's nothing I can do about it.

THE COURT: Are you okay?

JUROR NUMBER 23: It will go on constantly, but go ahead.

THE COURT: Okay. As I say, you may not make your own mind up about any material fact in this case. That is because the Defendant is presumed to be innocent, as you have heard. That presumption of innocence lasts through the trial. And then at the end of the trial, during your deliberations, if, and only if, the district attorney, the Prosecution, proves beyond a reasonable doubt each and every [9] element of each charge may you consider the Defendant at that time guilty. Until that time, if it should come, the Defendant is presumed to be innocent.

Consequently, until the entire case is finished and you begin your deliberations, you may not make your own mind up about any material fact in the case because you must listen to the entire case before deliberations begin. Please do not try to gather any information on your own in this case. The case must be decided upon the evidence presented at the trial. There is an instruction that I give – I will give it at the end of this trial and I will tell you now – that the case is decided on the evidence from this witness stand or the lack of evidence in the case.

Because the case is determined on the evidence or the lack of evidence that you hear, you may not gather evidence on your own. You may not do any investigation. All the evidence that you are to hear will be from this witness stand or from documents that are presented through the witness stand or photos or anything else that you see that are admitted into evidence. If you don't see it here, it is not evidence in the case, and then there would be a lack of evidence, which is a legitimate basis upon which to rest a verdict, the evidence or the lack of evidence.

That's the reason why you can't be the investigators. This is probably the most important [10] admonition that I give because, in this day and age, if you have a question about something – let's say this were a civil case involving medical negligence and there was a medical term that was presented from the stand and it just wasn't explained very well and you go, Well, I know how to find that out. I'll just Google it up. You can't do that. That's investigation.

You may hear a name or a term. You may hear a location and say, I'm going to go on MapQuest and get an aerial view, and I'll see exactly what that intersection where that auto accident is alleged to have happened looks like. You can't do that. You can't Twitter. You can't e-mail. You can't research to anyone or about anything in this case.

Ten years ago, this wasn't a problem. It's a great problem now. I will never know whether this happens. You have taken an oath before Judge Antrim and, essentially, before me to be a juror in this case and not to do that. I will as well give this admonition each time that you go on break. I will refer to it very simply as admonition number one. I won't go into this excruciating detail again because I know that you understand this.

So let me explain what is going to be happening here in the next couple of days. After the jury-selection procedures, the first step in the trial is opening [11] statements. We will be doing that here today. I am going to probably – well, we're going to be doing that immediately after this advisement.

Either attorney may make an opening statement if he or she wishes to do so. However, the Defendant's attorney may reserve opening statement until a later time in the trial or elect not to do an opening statement at all. That is the choice of the Defense and the defense attorney. That's because, as you have been told, the Defendant is presumed to be innocent.

As a result of the presumption of innocence, the Defense has to produce no evidence. The Defendant has to produce no testimony if they wish. They may simply sit silent if they wish, if the Defendant wishes, because the Defendant is presumed to be innocent. If the Prosecution does not convince you beyond a reasonable doubt as to each element of each charge, then the Defense has to do nothing. Now, they may elect to do something, but they are not required to do anything, including an opening statement if they wish.

After opening statements, the Prosecution will offer evidence. The evidence consists of the sworn testimony of the witnesses, the exhibits admitted into evidence by the Court, and any other facts that you are instructed by the Court to consider. After the Prosecution's evidence, the [12] Defendant may present evidence but is not required to do so.

I will remind you again that the Defendant is presumed innocent. The Prosecution must prove the guilt of the Defendant beyond a reasonable doubt. The Defendant does not have to prove his innocence because it is presumed. The Defendant doesn't have to call any witnesses or introduce any evidence.

You may have to decide what testimony to believe. Consider all of the testimony given and the circumstances under which each witness has testified. Consider each witness' knowledge, motive, state of mind, demeanor, and manner while on the witness stand. Consider the witness' means of knowledge, ability to observe, and strength of memory.

Consider also any relationship each witness may have to either side of the case, the manner in which each witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported by or contradicted by other evidence in the case. Consider all facts and circumstances shown by the evidence which affect the credibility of each witness' testimony.

You may believe all of the testimony of a witness, part of the testimony of a witness, or none of that witness' testimony. That is for each of you to decide and, ultimately, for 12 of you to decide. That's the third part.

[13] Choosing the jury, opening statements, and evidence. The third part of the case.

The fourth part of the case. At the conclusion of the evidence, I will give you the rules of law which you are to use in reaching your verdict. I will read them to you from the written jury instructions. You will each have a copy, your own copy of those instructions, as I read them to you. Those are the rules of law. You will be allowed to take those copies – make any notes on them that you wish – back into the jury room with you for your deliberations.

After you have heard all the evidence and the instructions, the fifth part of the case. The Prosecution and the Defense may, then, make their closing arguments. The opening statements that will be made here today are not evidence. They are merely the attorneys' view of what they anticipate you will hear in the evidence, what they are going to be putting on, or what you will hear from the other side in the case of the Defense. It's not evidence. It is merely their view of the evidence. They're giving you a little preview of it.

You will, then, have the evidence. After that, the written instructions of law and then the closing arguments. Closing arguments are also not evidence. It's merely each attorney's view of what you have heard. They will tell you what they anticipate you are going to here.

[14] Then you will hear it, and then they will summarize it for you in the way which they wish you to consider it.

It is, of course, up to the jury to decide how to organize and determine the facts in the case which are true. Neither opening nor closing are evidence. It is only the middle section, the presentation of evidence, which are the facts.

At that point, the sixth and final phase of the trial will begin, and that is jury deliberation. After all other matters – opening, evidence, closing – or my written jury instructions and closing – then I will charge 12 of you to deliberate this case.

The alternate will be excused. The alternate was chosen some ten days ago by seat position. Whoever ended up in that seat, that is the alternate. We didn't know who you would be, and now you do not know, of course, who the alternate is. As far as each of you are concerned, you are a member of the 12 people who will decide this case as the jury.

Then, and only then, when I charge you with deliberation, may you first decide the matters in your own head, make final determinations of material issues of fact in your own mind, and for the first time talk with your fellow jurors about the facts in the case. Before that, you may not do either.

[15] At times during the trial, the attorneys may make objections. This simply means that the attorney is requesting that I make a decision on a particular rule of law. It is the duty of an attorney to make objections as to evidence which he or she feels is not

appropriate to be introduced in the case. Do not hold an attorney accountable for an objection. Don't hold it against him or her. It is their job to object to evidence.

I will try to rule on each of those objections very quickly so that it does not interrupt the flow of the case. If I need to talk with the attorneys privately, I will bring them up here. We have a little white noise machine there we turn on, and we talk very softly into a microphone out of your hearing. It's not that these are secret matters. It is simply that if we discuss them in your presence, we would probably be discussing exactly what you are not supposed to be hearing as far as the evidence is concerned.

If I overrule an objection, that means that the objection will not occur and you will hear the evidence from the witness. If I sustain an objection, that means that you will not hear the evidence because it is somehow legally inappropriate to ask that question. If a question – if an objection is sustained and you do not hear the answer, do not speculate or guess as to what that answer from that witness might have been. It may have been very interesting to you, [16] but I would have ruled at that point that it is legally inappropriate for you to hear that answer. Please don't try to guess what that answer might have been.

Sometimes, answers to questions are objectionable. So the question is fine, but the answer that the witness gives itself is inappropriate under the law. If an objection to an answer is given, I will, then, have the – I will either overrule the objection, in which case the case merely goes forward. You have heard the evidence and consider it. If I sustain an objection to an answer, I have the unenviable job, then, of turning to you and telling you to disregard what you've just heard.

Lawyers call that unringing the bell. It's very difficult to do, very difficult. But I will instruct you that what you have just heard is inappropriate, not admissible in the case, and you must not consider it in any way in your deliberations on a verdict. Difficult but that's sometimes what happens. It may not happen in this case; but if it does, that's what I will be telling you.

It's my job to decide what rules of law apply to the case. These are the written instructions of law that I have told you about briefly. You must follow all of the rules of law in writing that I give to you. Even if you disagree with those laws or don't understand the reason behind the law, you must follow those laws, and that is what [17] you have sworn to do as a juror in this case.

You must, then, apply those laws to the facts which you determine, and only the jury determines the facts in the case. That's why you're called the finders of fact. I determine the law. You determine the facts which apply to those laws. In that way, you will determine whether the Prosecution has proven the guilt of the Defendant beyond a reasonable doubt. Until that time, remember, the Defendant is presumed to be innocent.

During the trial, I may need to talk with the attorneys out of your hearing. Sometimes these conferences – if we cannot resolve the issue quickly either at the podium or up here, we'll ask you to leave the room for a brief time. We will try to minimize that and try to do our business here out of your hearing so you don't have to march in and out a lot, but sometimes it will occur. Hopefully, not very often.

You have received notebooks. You may use the notebooks to take notes during the trial; however, you're not required to do so. It's merely for your convenience. If you do take notes, please do not allow the note-taking to detract from your observation of these witnesses. As I indicated, much of your decision-making will be made by what you observe, the demeanor of the witnesses, what they say, and how they say it, not just what they say.

[18] So if you do take notes, your job is not to be a stenographer, to take everything down word for word. You can do whatever you wish but please do try to pay close attention in watching the witnesses. As you can see, Cathy is taking everything that we say down here. This is the most strenuous job in the courtroom, as you can probably imagine.

Everything we say, word for word, and identifying it to every person who says it takes a great deal of concentration.

This record that she creates, however, is not for your use. You may not, at the end of this case, ask for a transcript of Mr. Smith's testimony or Jane Doe's testimony or whatever. That is not available for you. You must rely on your memory, on your notes, or the notes of others, although you are not bound by anyone else's notes. You're not even bound by your own notes. But you may, certainly, use any of those as a collective memory when deliberations begin.

During the course of the trial, I may ask a question of a witness. I try not to do that. Ninety-nine times out of a hundred, if I do ask a witness a question, it will be the following: A witness will have been asked a question which is, essentially, a yes-or-no question and they'll go "uh-huh." And if the attorney does not immediately catch that and ask them, I will turn to them and say, Was that a "yes"?

[19] It's not fair to the court reporter and it's, certainly, not fair to you to try and distinguish an "uh-uh" from an "huh-uh" or a shake or a nod of the head. The court reporter will report that, but it's not fair, and I will – if it is not corrected by the attorneys, I will turn to the witness – and usually it only takes once. It's very common. But once corrected, they will usually not do it again. If they do, I'll just ask them again.

That will be the only time that I ever address a witness directly. If I do so, please remember, that is not a signal that that is a crucial or important question or more important than any other question. It's merely to straighten out the record and make sure that you understand what the answer is and that we have a clear recorded record for other purposes.

During the questioning in my courtroom, we have four types – traditionally, four types of questions. We have direct examination, which is, when an attorney calls a witness to the stand, they ask direct-examination questions. After that examination is completed, we have, by the other attorney, cross-examination, sometimes a very different type of questioning, and I'll explain that in a minute.

After cross-examination, based on those questions in cross, we have redirect by the first attorney. And, of course, based on redirect questions, we have recross.

[20] Direct, cross, redirect, recross. I explain this for two reasons. One, an objection may be made to a question that's asked on direct examination which I would sustain the objection because it would be an inappropriate question on direct. The same exact question in exactly the same words in the same way can be asked on cross and be completely appropriate.

So that if I sustain a question on direct and overrule the objection – or sustain an objection on direct to a question and overrule the objection or permit the same question on cross, please don't think I'm favoring one attorney over the other. It is simply the rules of procedure in the courtroom about the difference between direct and cross-examination.

I also explain those four parts – direct, cross, redirect, recross – because when that's finished, I will turn to you and say, That completes the examination of Mr. Smith. Rules governing jury trials in Colorado do not allow jurors to ask questions directly of a witness.

However, if you have a question in your mind at the completion of that direct-cross-redirect-recross cycle still in your mind, a question that you don't feel this witness has answered and it's in your mind, write that question down. You'll find the forms in the back of your jury notebooks, juror questions.

[21] And those will be collected by the bailiff; or if not, our court reporter will get to stretch her legs and get them; or I'll get them. You'll pass them down to the front, fold them in half, put them right there on the bar in front of you. I will review them. I will, then, review them with the attorneys just as if they were questions from attorneys. If they are appropriate questions, I will ask the witness the question. The witness will answer directly to you, and the attorneys may follow up on it.

Just as if it were asked by an attorney, if it is a question that is not appropriate, I will tell you as a group, just as I would tell an attorney, why I can't – the legal reason, evidentiary reason, for not asking it. Maybe it's hearsay. Maybe it's – whatever. I will tell you that. If I do not ask a question that you have presented, please do not guess or speculate as to what the answer might have been.

Also, with those questions, you have pages to take notes with sections for each witness. Just write the witness name, if you wish to do it that way, in your notes. If you have a question, say, in cross-examination, gee, what about this, well, by the end of the entire examination, all four parts of it, it may not be important to you anymore or it may have been answered. At that time, at the end, write it on the juror-question form. If you submit a question during direct, in all likelihood, it's going to be answered. So [22] please save that until the end.

If you're still writing when I turn to you and say, That completes the examination of witness X, we'll wait for you – don't worry about it – and pass those forward then. After the first witness, I will remind you not only that this is the completion of witness X's testimony, but I will say, This is the time if you have questions. I will do that once. After that, I will simply turn to you after each witness and say, That completes the testimony of witness X. I will rely on you, then, to understand that that's the time if you have a written question.

Once the witness leaves the stand, that's the end of any question you may ask of that witness. We cannot re-call a witness if you later think, gee, I wish I would have asked witness X three hours ago about this. That's too late. It must be done while the witness is still on the stand.

I am going to have the first of my little conferences with counsel. If you'd approach. Off the record.

(The Court and Counsel had a discussion off the record at the bench out of the hearing of the jury.)

THE COURT: Those are all the comments that I have. We will now have the opening statements from the parties.

* * *

[29] THE COURT: Thank you.

Ladies and gentlemen, this has already been a long day for you. I know that. And what we are going to do now is to adjourn. We're going to be back at 8:30 tomorrow morning with our first witness and proceed through the day with as many witnesses as we can do tomorrow and proceed as quickly as we can. Until that time, Amanda will take you back to your jury room. You may, then, leave for the day.

I will give you, as you heard, admonition number one. My brief version of it is, please do not make your own mind up about any material fact in the case. Do not talk to any third parties at all about any aspect of this case. If someone asks, you may tell them that you are a juror in a criminal case – not the type of case, not anything more than that – simply a juror in a criminal case and you'll be involved here for three more days possibly, and that's it.

Please do not do any investigation. You have heard the outline of what the attorneys feel the evidence may show. You have heard no evidence so far. So please don't do any investigation about any names, places which you have heard about. And we'll see you tomorrow at 8:30. Thank you very much.

REPORTER'S TRANSCRIPT

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.

KELLY C. CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for trial before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, February 25, 2010.

This is a complete transcript of the proceedings had in the case at that time.

* * *

[76] THE COURT: Thank you.

(The last instruction was read, but not reported.)

THE COURT: That is an additional restriction on you than simply the admonition one that I've given to you earlier during breaks. The reason that it is so important during deliberations is that you have confidential deliberations that no one can talk to you. And that you not have the ability to talk [77] to anyone is because at that time, for the first time, not only will you be able to consider the matter yourself, but you'll be able to talk with your 11 other jurors, each of you, 12 in total, about the case.

Consequently, during your deliberations, during the time that you're in the jury room, we will be taking your cell phones, laptops, any communication devices.

Amanda will keep those in my chambers until such time as your deliberations are complete, or that you adjourn for the day and return, if that should occur. However, during that time, you will not be able to communicate with anyone.

As you know, your lunch will be brought in to you. That's where you'll eat. If you require a break, Amanda will escort you to a private place where you could have a break. But if you leave the jury room, there will be no discussion, no deliberation during that time. Deliberations may only occur first while you're in the jury room and, second, while all jurors are present. If someone has adjourned for a minute to the restroom or something, no deliberations, no discussions may occur.

You'll have the following – or will soon have [78] the following information to assist you in reaching your verdict. You have your own copy of the jury instructions. And attached to those is a copy of the verdict forms. You can do anything you wish with those, make notes on them. They are easily distinguished from these original copies which are in these folders – the original instructions, which are not stapled, and the original verdict forms, not stapled. You could tell if it is a copy because it's either stamped "Copy," or all stapled together. The foreperson will have these originals. I ask you not to make any marks whatsoever on the original instructions. And the only marks that should be on the original verdict forms are the signatures of the – signature of the foreperson on each verdict form. Those are the only marks that should be on the verdict form.

In addition, you'll have all of the evidence in the case. There's not a lot of it as far as physical evidence, but all the evidence that you've heard, of course, in testimony, you have as well in your notes or your memories. We will put all the physical evidence in a folder as well marked "Exhibits." Please do not mark on the original exhibits, although you may do anything else as far [79] as viewing them.

I'm going to swear in Amanda as the bailiff. I'll swear my clerk, if necessary. My clerk will also act as bailiff.

(The bailiff was sworn by the Court.)

JURY INSTRUCTIONS

Instruction Nos. 1 through 21 given by the Court this 25th day of February, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

INSTRUCTION NO. 1

Members of the jury, the evidence in this case has been completed. In a moment I will read you the law which you must apply in order to reach your verdict. But first, I want to mention a few things that you need to keep in mind when you are discussing this case in the jury room.

It is my job to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them. You must follow all of the rules as I explain them to you. Even if you disagree or don't understand the reasons for some of the rules, you must follow them. No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole.

During the course of the trial you received all of the evidence that you may properly consider to decide the case. Your decision must be made by applying the rules of law which I give you to the evidence presented at trial. Neither sympathy nor prejudice should influence your decision.

If you decide that the prosecution has proved beyond a reasonable doubt that the defendant has committed the crime as charged, it will be my job to decide what the punishment will be. You should not try to guess what the punishment might be. It should not enter into your consideration at any time.

At times during the trial lawyers made objections to questions asked by other lawyers and to answers by witnesses. Do not draw any conclusions from such objections or from my rulings on the objections. These only related to the legal questions that I had to determine and should not influence your thinking. When I told you not to consider a particular statement, you were told to put that statement out of your mind, and you may not consider any statement in your deliberations which you were instructed to disregard. Finally, you should consider all the evidence in the light of your observations and experience in life.

INSTRUCTION NO. 2

There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence. The other is circumstantial evidence, that is, the proof of facts from which other facts may reasonably be inferred. The law makes no distinction between direct and circumstantial evidence.

INSTRUCTION NO. 3

The evidence in this case consists of the sworn testimony of all the witnesses and all exhibits received into evidence.

You are to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

INSTRUCTION NO. 4

You may have to decide what testimony to believe. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

Consider each witness' knowledge, motive, state of mind, demeanor, and manner while on the stand. Consider the witness' means of knowledge, ability to observe, and strength of memory. Consider also any relationship each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence which affects the credibility of the witness' testimony.

You may believe all of the testimony of a witness, or part of it, or none of it.

INSTRUCTION NO. 5

The mere number of witnesses appearing for or against a certain proposition does not in and of itself prove or disprove said proposition.

INSTRUCTION NO. 6

In this case you have heard out-of-court statements of [Ca.M.], which were admitted into evidence. You are instructed that it is for you to determine the weight and credit to be given these statements. In making this determination, you shall consider the age and maturity of the child, the nature of the statements, the circumstances under which the statements were made, and any other evidence that has been admitted that you choose to consider for this purpose.

INSTRUCTION NO. 7

The defendant is never compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

INSTRUCTION NO. 8

You are instructed not to allow gender bias or any kind of prejudice based upon gender to influence your decision.

INSTRUCTION NO. 9

In this case a separate offense is charged against the defendant in each count of the information. Each count charges a separate and distinct offense and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged.

The defendant may be found guilty or not guilty of any one or all of the offenses charged.

INSTRUCTION NO. 10

The defendant, Miguel Angel Pena-Rodriguez, is charged with committing the crimes of Attempted Sexual Assault on a Child, Unlawful Sexual Contact, and Harassment (2 counts), in Arapahoe County, Colorado, on or about May 13, 2007.

The Defendant has pleaded not guilty to the charges.

INSTRUCTION NO. 11

The charges against the defendant are not evidence.

INSTRUCTION NO. 12

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative, or imaginary doubt, but such doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

As to each count, if you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty as to that count. If you find from the evidence that the People have failed to prove any one or more of the elements of any count beyond a reasonable doubt, you will find the defendant not guilty as to that count.

INSTRUCTION NO. 13

A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. Voluntary act means an act performed consciously as a result of effort or determination. Culpable mental state means intentionally or knowingly, as explained in this instruction. Proof of the commission of the act alone is not sufficient to prove that the defendant had the required culpable mental state. The culpable mental state is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

A person acts "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.

A person acts "knowingly" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

INSTRUCTION NO. 14

The elements of the crime of Attempted Sexual Assault on a Child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. attempted to knowingly,
    a. subject another not his or her spouse,
    b. to any sexual contact, and
4. that person was less than fifteen years of age, and
5. the defendant was at least four years older than that person,
6. at the time of the commission of the act,

7. without the affirmative defense described in Instruction No. 19.

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Attempted Sexual Assault on a Child.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Attempted Sexual Assault on a Child.

INSTRUCTION NO. 15

"Attempt" as used in the Instructions for Attempted Sexual Assault on a Child requires a substantial step toward the commission of that offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

INSTRUCTION NO. 16

The elements of the crime of Unlawful Sexual Contact are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly subjected a person to any sexual contact,
4. with knowledge that that person did not consent,
5. without the affirmative defense described in Instruction No. 19.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Unlawful Sexual Contact.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Unlawful Sexual Contact.

INSTRUCTION NO. 17

Certain words have certain definitions under the law. The following words have the following meanings in these instructions:

"Sexual Contact" means the intentional touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

"Intimate Parts" means the external genitalia or the perineum or the anus or the pubes or the buttocks or the breast of any person.

"Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent. Submission under the influence of fear shall not constitute consent.

INSTRUCTION NO. 18

The elements of the crime of Harassment are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,
3. with intent to harass, annoy, or alarm another person,
4. touched a person or subjected her to physical contact,
5. without the affirmative defense described in Instruction No. 19.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Harassment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Harassment.

INSTRUCTION NO. 19

It is an affirmative defense to each of the crimes charged that the defendant was not at the place of the crime at the time of its commission and that he was in fact at another place. This constitutes the affirmative defense of alibi.

As noted in previous instructions, the prosecution has the burden of proving each of the elements of each crime charged beyond a reasonable doubt, and has the burden of proving the absence of the affirmative defense of alibi beyond a reasonable doubt.

INSTRUCTION NO. 20

Once you begin your deliberations, if you have a question about the evidence in this case or about the instructions or verdict forms that you have been given, your Foreperson should write the question on a piece of paper, sign it and give it to the bailiff who will bring it to me.

I may confer with the attorneys as to the appropriate way to answer your question. However, there may be some questions that, under the law, I am not permitted to answer. If it is improper for me to answer the question, I will tell you that. Please do not try to guess about what the answer to your question might be or why I am not able to answer a particular question

INSTRUCTION NO. 21

Once the closing arguments are completed, the bailiff will escort you to the jury room. Upon reaching the jury room, you are to select one of your members to be the foreperson of the jury. Your foreperson will preside over your deliberations and shall sign whatever verdict you reach.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

Only one verdict shall be returned signed for each count, and it and the unsigned verdicts and these instructions shall remain in the possession of your foreperson until such time as they are called for in open court. Upon reaching a verdict, you will inform the bailiff of this Court, who in turn will notify the Court, and you will remain in your jury room until called into the Courtroom.

You will be provided with four verdict forms, one form for each count. Each form will contain a section for each verdict. When you have unanimously agreed upon your verdicts, you will select the section on each form which reflect your verdicts, and the foreperson will sign them as the Court has stated.

The forms of verdict you will receive will now be read to you. You are further instructed that no inferences are to be drawn from the order in which the Court reads the verdicts.

ADJOURNMENT INSTRUCTION

As you have previously been instructed, there are certain admonitions and orders that continue to govern your conduct in this trial during your deliberations:

First, you are not to discuss this case among yourselves, except when the entire jury is together in the jury room for deliberations. You should also not discuss this case with anyone else. In fairness to the parties to this lawsuit, you should keep an open mind through the trial, and you should reach your decision only during your final deliberations.

Second, you may not permit any third person to discuss the case in your presence. If anyone attempts to do so, please leave their presence immediately and report that fact to the bailiff.

Third, do not speak with any attorney, any witness, or any party in the case.

Fourth, do not attempt to gather any information on your own. Do not engage in any outside reading on this case. Do no attempt to visit any places mentioned in the case. Do not use any resource material, including the Internet, to gather any information on issues in this case. Do not in any way try to learn about the case outside the jury room.

Fifth, do not read about the case in the newspapers, or listen to radio or television or any media broadcast about the trial. You must base your verdict solely on the evidence presented at trial.

In order that the Court may keep a record of the fact that you have been reminded of these admonitions, each juror must sign below indicating that you have read, understand and will abide by these admonitions.

You are to reassemble in the jury room to continue your deliberations on

Friday, February 26, 2010, at 8.30 a.m.

By the Court:

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

I have read and understand these admonitions on February 25, 2010:

[Signatures of twelve jurors.]

REPORTER'S TRANSCRIPT

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.

KELLY C. CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for trial before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on [Friday, February 26, 2010 (according to court reporter's attestation)].

This is a complete transcript of the proceedings had in the case at that time.

* * *

[2] THE COURT: Back on the record in 07CR2311. Counsel are present. Defendant is present.

We got a note from the jury which I attached here, unsigned, unfortunately. We'll mention that to the jury, anything they send out has to be signed by the foreperson. "The jury is hung, Judge."

That's a proposal of what I would read to them. I'm not going to send anything in to them. I want to have them in here and read it to them. That's 38:14, pretty standard admonition, the modified *Allen*. The only question would be if I read the last – that bracketed paragraph. I usually do not read that the first time I have jurors in here to kick them in the pants a little. I don't tell them that I will hang the jury. And if I feel if they come back another time and I feel they are truly not ready, I will tell them that as well, but not this time. So I would just tell them they are going to go back and give them the lunch menu.

MR. MEYRICK: You'll bring them out to do this?

THE COURT: Yes. I've only had this two times before. I only had one hung jury before, one time [3] that I had to send a notice back, but I did that in writing. This seems a little different. I want to look them in the face.

MR. MEYRICK: Okay.

THE COURT: Kick them in the butt a little. (The following proceedings were had within the presence of the jury:)

THE COURT: Thank you. Please be seated.

Thank you, ladies and gentlemen. Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts which you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict, if you can do so without doing violence to individual judgments.

Each of you must decide the case for yourself. But do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous. But do [4] not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence presented in the case.

You will now return with the bailiff to the jury room to continue with your deliberations. Thank you.

(The following proceedings are had outside the presence of the jury:)

THE COURT: We're going to give them a lunch menu right now. As she's going in there, she will tell them that. And see what we get.

We're going to recess for just a few minutes.

* * *

4:00 p.m.

THE COURT: We're reconvened in 07CR2311, People versus Miguel Pena-Rodriguez.

I got a note from the jury that they have reached verdicts on three of the four charges, and cannot reach a verdict on the fourth charge, whichever that is, signed by the foreperson. I'm not sure that it would serve any great purpose for [5] me to give them the *Allen* instruction again. They got very loud for a while. We had to quiet them down, and then this came out.

So I think that that would indicate that they've probably done as well as they could do. And my intent would be to bring them out, inquire of them if they feel that they are – I'll ask the foreperson if they feel they are hopelessly deadlocked on this fourth charge, and ask them if they feel they could make any progress towards unanimous verdict if they were allowed to continue to deliberate. My guess is they will say no, but I will ask each one of them. If that's the case, then we'll take – I will then, and only then, take the verdict forms, and we'll find out what the three of the four are, and apparently then the fourth will be hung in mistrial. Any suggestions other than that?

MS. KRUSEY: No, Your Honor.

MR. MEYRICK: No, Your Honor.

THE COURT: Let's bring them in.

(The following proceedings were had within the presence of the jury)

THE COURT: Thank you, ladies and gentlemen. Mr. Foreperson, in your opinion, as foreperson of the jury, would further deliberations by this [6] jury likely result in a unanimous verdict on the fourth of the four counts?

FOREPERSON: No, Your Honor.

THE COURT: Do you believe that the jury is now hopelessly deadlocked?

FOREPERSON: Yes, Your Honor.

* * *

[10] THE COURT: The Court notes that the jury has now been deliberating for approximately 12 hours, yesterday and today. The Court notes that – I did not note the time, but that earlier today the jury was instructed in accordance with Colorado jury instruction – criminal instruction 38:14.

The Court now finds that the jury in this case is hopelessly deadlocked as to one of the four counts, and that further deliberations by this jury would be to no avail on that count, and that there's [11] no reasonable probability of agreement by this jury.

Accordingly, at this time the Court declares a mistrial as to that count. And as to that count, the jury will have no further deliberations.

At this time, I'll accept the verdict forms from the foreperson.

(Verdict forms tendered to the Court.)

THE COURT: Mr. Pena-Rodriguez, the verdict of the jury is this: As to Count One, Attempted Sexual Assault on a Child, this is the count on which the jury has mistried and found no verdict.

Count Two, Unlawful Sexual Contact. (2), We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Unlawful Sexual Contact.

Count Three, Harrassment as to [Ca.M.] (2), We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Harassment.

And Count Four, Harassment as to [J.C.], (2) We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Harrassment.

* * *

DEFENDANT'S MOTION FOR JURY CONTACT INFORMATION AND MOTION FOR EXTENSION OF TIME FOR A NEW TRIAL UNDER RULE 33

Defendant, MIGUEL PENA-RODRIGUEZ, through his lawyers, Michael W. Meyrick and Kelly Cherry Law Offices of Michael Meyrick, P.C., moves this Court for an Order directing the Jury Commissioner to provide the Defendant with contact information for the jurors in this matter and for an enlargement of time to file for a new trial if necessary. As grounds therefore counsel states:

1. Allegations have been made that there was contact in the hallway between one of the witnesses in this matter and a juror. In an attempt to investigate that allegation Counsel requires jury contact information and an enlargement of time in order to conduct appropriate interviews.

2. Allegations have been made that some members of the jury used ethnic slurs in the course of deliberations that were directed against the Defendant and/or toward the sole witness for the defense. During *voir dire* defense counsel inquired of the jury panel whether any prospective juror harbored any bias that might render him or her unfit to serve on this particular case. There were no affirmative responses. Counsel requires jury contact information and an enlargement of time in order to investigate whether there was a failure to disclose such information during *voir dire*.

3. Rule 33 provides that any motion for a new trial must generally be brought within 15 days of the verdict. However the Rule provides for an enlargement of time, at the discretion of the trial court, where application is made within the 15 day period.

WHEREFORE, the Defendant moves this Court for an Order:

a. Directing the Jury Commissioner to provide contact information for the jurors seated in this case to defense counsel for the purpose of conducting this investigation; and

b. An Order granting an enlargement of time for a period of 30 days from the date such requested contact information is provided to defense counsel.

Respectfully submitted this 12th day of March 2010.

LAW OFFICES OF
MICHAEL MEYRICK, P.C.
/s/ Michael W. Meyrick
Michael W. Meyrick, #29748
Kelly Cherry, #40105
Attorneys for the Defendant

ORDER – Re: Defendant's Motion for Jury Contact and for Enlargement of Time for Motion for New Trial – Preliminary Order

Having reviewed the "Defendant's Motion for Jury Contact Information and Motion for Extension of Time for a New Trial Under Rule 33," and otherwise being fully advised of the current status of the Motion, the Court rules as follows:

1. The Court considers that defendant's Motion for juror contact information and an enlargement of time to file a formal motion for new trial is governed by the same rules and procedures under Colo.R.Crim.P. 33(c) that govern a motion for new trial.

2. As required under Rule 33(c), before the Court will consider granting contact with deliberating jurors regarding unsubstantiated juror misconduct, the Court requires one or more affidavits to be submitted by the defendant regarding the "who, what, when, and where" of the allegations of juror misconduct. These affidavits must include all information about who provided this information, to whom the information was provided; when the information was provided, under what circumstances the information was provided, and of course, the exact substance of the information provided.

3. Affidavits from the defendant must be filed within fifteen (15) days of this Order.

4. After affidavits are submitted by the defendant, the Court will permit the prosecution a period of fifteen (15) days within which to respond in writing to defendant's request to contact the jurors. After that period (whether or not a response from the prosecution

is received), the Court will rule on the defendant's Motion. Please forward a copy of the affidavits and any response to the Court by e-mail, in addition to "hard" copy filing: john.wheeler@judicial.state.co.us

5. The running of the period for defendant to file a motion for new trial will be tolled for its full period under Rule 33(c) until the Court rules on the defendant's current Motion. The Court will address any additional enlargement of that period in its Order on the current Motion to contact deliberating jurors.

By Order of the Court this 12th day of March, 2010.

/s/ John L. Wheeler
John L. Wheeler
District Court Judge

Cc: All parties

DEFENDANT'S MOTION FOR DISCLOSURE OF JURY INFORMATION

COMES NOW the Defendant MIGUEL PENA-RODRIGUEZ, through his lawyers, Michael Meyrick and Kelly Cherry, who move this Court for an Order authorizing the jury commissioner to disclose juror contact information to defense counsel for the purpose of determining whether a motion for a new trial is appropriate under Rule 33 of the Colorado Rules of Criminal Procedure. As grounds therefore counsel states:

1. The Court, by its Order of March 12, 2010, has permitted an enlargement of time to allow the defense to make this motion supported by the appropriate affidavits.

2. The Defendant makes this motion in order to investigate allegations of potential juror/witness misconduct and/or a failure to disclose material information by certain jurors as set forth in the attached affidavits.

3. On February 26, 2010, after the verdict in this case, the Defendant's wife, Barbara Pena, disclosed to defense counsel that after the testimony of the State's witness and lead investigator, Deputy Jeremy Nesvold of the Arapahoe County Sheriffs Department, she observed Deputy Nesvold and another non-witness Deputy Sheriff engaging in a conversation with one of the jurors in the hall outside the courtroom. The cross-examination of Deputy Nesvold focused, in large part, on the failure of police to attempt to obtain any fingerprint evidence at the crime scene. Ms. Pena overheard the juror ask the deputies

whether it was common practice to collect fingerprint evidence in these types of cases. She was unable to hear a response because she was walking away from the place where the conversation was taking place but after walking down the hallway she turned and observed that the juror and the deputies were still engaged in conversation several seconds later. Exhibit 1, Affidavit of Barbara Pena.

4. Notwithstanding the lack of juror contact information, after the trial defense counsel attempted to have a defense investigator Interview Deputy Nesvold about the alleged juror contact in the hall. Deputy Nesvold declined to be interviewed. Exhibit 2, Affidavit of Kristin DiDonato.

5 Subsequent to the verdict, co-counsel Kelly Cherry interviewed members of the jury. After most of the jury had left the room, two of the jurors remained behind and told Ms. Cherry that some of the other jurors, in the course of deliberations, expressed a bias against the Defendant and his alibi witness because the Defendant and witness were Hispanic. Exhibit 3, Affidavit of Kelly Cherry.

6. The proper investigation of these matters necessitates the release of juror contact information.

7 Any contact between a witness and a juror, if it occurred, would have been a violation of the Court's order to the jury. Any extraneous information that a juror sought, obtained or shared with others is the proper subject of an inquiry into juror misconduct. Rule 606 (b) Colorado Rules of Evidence. *Stewart v, Rice*, 47 P.3d 316 (Colo. 2002).

8. The United States Constitution, Amendments VI, XIV, and Colorado Constitution, Article H, Sections 16 and 25 guarantee a defendant a right to a fair trial. The right to an impartial jury is implicit in the constitutional right to a fair trial. *Morrison v. People*, 19 P.3d 668 (Colo, 2000).
9. Voir Dire is designed to ferret out jurors whose, "beliefs... interfere with a party's right to a fair trial." ***Black v. Waterman***, 83 P.3d 1120 (Colo. App. 2003). During the Voir Dire process defense counsel inquired of the jury panel if any juror harbored any bias which might cause the juror to be unfair in this particular case. No potential juror indicated that he or she did. A bias that is based on ethnicity is one that should have properly been disclosed.
10. An essential element of a fair trial is the right to challenge jurors for cause. *People v. Harlan*, 8 P.3d 448 (Colo. 2000). If a juror deliberately misrepresents or fails to disclose information potentially relevant to a preemptory challenge or knowing conceals a bias, that fact alone may require a new trial as it shows the juror is likely unabale to render a fair or impartial verdict. ***Black v. Waterman***, 83 P.2d 1130, 1137 (Colo. App. 2003) citing *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

WHEREFORE the Defendant moves this Court for an Order to the Jury Commissioner directing that the Commissioner disclose to defense counsel contact information for all jurors seated in the above captioned matter to enable counsel to conduct the appropriate investigation into whether a Motion for a New Trial is warranted pursuant to Rule 33, Respectfully submitted this 22nd day of March 2010.

LAW OFFICES OF MICHAEL MEYRICK, P.C.

/s/ Michael W. Meyrick
Michael W. Meyrick #29748
Kelly Cherry, #40105
Attorneys for the Defendant

EXHIBIT 1

AFFIDAVIT OF BARBARA PENA

I, Barbara Pena, depose and say:

1. I am over the age of eighteen.

2. I am married to the Defendant in this matter, Miguel Angel Pena-Rodriguez.

3. I was present in the courtroom during the trial in the above captioned matter.

4. On Wednesday, February 24, 2010, 1 was present in the courtroom during the testimony and cross examination of Deputy Nesvold of the Arapahoe Sheriff s Department.

5. During that cross examination, one of the primary issues was the lack of fingerprint evidence in the case and Deputy Nesvold's explanation about that.

6. At the end of Deputy Nesvold's testimony the jury was released for the day.

7. Deputy Nesvold left the courtroom and went out into the hallway.

8. I went out into the hallway shortly thereafter on my way to the restroom.

9. Deputy Nesvold was standing in the hallway speaking with one of the deputy sheriffs who was not a witness but who had been sitting in the back of the courtroom for much of the trial.

10. When I walked out into the hallway I saw one of the male jurors who was wearing a maroon plaid shirt, blue jeans and boots speaking with Deputy Nesvold and the other sheriff

11. I heard the juror say, "I have a general question. How often do you take fingerprints in these types of cases?"

12. I did not hear the response from Deputy Nesvold or other sheriff because I kept walking toward the restroom but I turned around severe seconds later to see that they were still conversing as I walked toward the restroom.

13. On Friday evening, February 26, 2010, after the verdict and after we left the courthouse I told my husband that he should tell his lawyers about this incident and he sent a text message on his phone to Kelly Cherry.

/s/ Barbara Pena
Barbara Pena

EXHIBIT 2

I, Kristen Di Donato, depose and say:

1. I am over the age of eighteen.

2. I am the legal investigator for the defense in the above caption matter.

3. At the request of the defense attorneys in this matter, I attempted to contact Deputy Jeremy Nesvold of the Arapahoe County Sheriff's Office, to interview him and determine whether he had any contact with any juror in the hallway while the trial was in progress.

4. I left three voice messages for Deputy Nesvold in an attempt to make arrangements to speak with him.

5. On March 15, 2010, at approximately 7:00 am, Deputy Nesvold left a message on my cell phone declining to speak with me about this matter and telling me that any questions for him would have to be directed to the Office of the District Attorney or the/Office of the County Attorney.

/s/ Kristin DiDonato
Kristin DiDonato
Investigator

EXHIBIT 3

AFFIDAVIT OF KELLY C. CHERRY

Kelly C. Cherry, co-counsel of record for the Defendant in this matter, duly sworn upon her oath, states as follows:

1. On February 26, 2010, after the jury verdict was returned in this matter, I entered the jury room and began discussing the trial with the jurors.

2. During that discussion but after most of the jurors had left the room, two remaining jurors informed me that some of the other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic.

3. After leaving the courthouse on the evening of February 26, 2010, I received a text message from the Defendant informing me that during the trial he saw two Sheriffs Deputies speaking with one of the jurors about the topic of fingerprinting.

/s/ Kelly C. Cherry
Kelly C. Cherry, #40105

ORDER – Re: Defendant's Motion for Disclosure of Jury Information - I

Having reviewed the "Defendant's Motion for Disclosure of Jury Information," including the response, and otherwise being fully advised of the current status of the Motion, the Court rules as follows:

A. Factual and Procedural Background.

1. The following scenario resulted in the jury's verdict against the defendant:

a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia,* the following question:

> 17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? __ If yes, please explain.

b. The jury venire was then sworn by the Court and *voir dire* began. During *voir dire,* both counsel and the Court inquired as to the prospective jurors' ability to render a fair and unbiased verdict in this case, and each juror who expressed any hesitation regarding his/her ability to satisfy this requirement was subjected, not only the Court's further inquiry, but to inquiry by counsel.

c. During trial, following question was asked by the jury (through the Court) of Deputy Jeremy Nesvold, and Deputy Nesvold answered to the jury:

> Why didn't you take fingerprints?

d. At the conclusion of *voir dire,* the Court administered the following oath to the thirteen jurors selected for the jury:

> Do you solemnly swear or affirm under penalty of law that you and each of you will well and truly try the matter at issue between the People of the State of Colorado and Miguel Pena-Rodriguez, the defendant, and render a true verdict, according to the evidence?"

e. Each juror answered in the affirmative and was then impaneled.

f. On February 25, 2010, at the conclusion of closing arguments, the alternate juror (#10) was discharged, and the remaining twelve jurors began deliberation at approximately 11:20 a.m.

g. At approximately 4:00 p.m. on February 26, 2010, the jury returned with "guilty" verdicts on Count 2 – Unlawful Sexual Contact, and Counts 3 and 4 – Harassment against two victims. The jury could not reach a unanimous verdict on Count 1 – Attempted Sexual Assault on a Child, and the Court declared a mistrial on that Count. After reading the verdicts, the Court polled each juror at the request of counsel, and each juror orally affirmed that these were their individual verdicts.

h. The jury was then discharged with the Court's instruction under COLJI- Crim. 1:06:

> You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for others to discuss the case with

> you and you may talk with them but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.

2. The following factual scenario has occurred since the entry of the verdict on February 26, 2010:

a. On March 11, 2010, the defendant filed "Defendant's Motion for Jury Contact Information and Motion for Extension of Time for a New Trial Under Rule 33," and the Court issued its "Preliminary Order" on March 12, 2010, requesting affidavits in support of defendant's Motion, in accordance with Colo.R.Crim.P.33(c) within fifteen days of the Order.

b. On March 23, 2010, defendant filed his amended "Defendant's Motion for Disclosure of Jury Information," including the following information:

(1) Affidavit of Barbara Pena (wife of the defendant) indicating:

(a) Observing an unidentified male juror state to Deputy Jeremy Nesvold (who had just concluded his testimony in this case): "I have a general question. How often do you take fingerprints in these types of cases?"

(b) Ms. Pena did not overhear Deputy Nesvold's response, but did observe that they continued conversing for a short time after the initial question.

(2) Affidavit of Kelly C. Cherry, Esq. (co-counsel for the defendant):

(a) While interviewing two unidentified jurors after the verdict, Ms. Cherry reported that "some of the other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic."

(b) Ms. Cherry received a text message from the defendant confirming his wife's statement that he also saw Deputy Nesvold speaking with a juror about fingerprinting.

(3) Affidavit of Kristen Di Donato (investigator for the defendant):

(a) Ms. Di Donato reported that Deputy Nesvold had declined to speak with her about the issue raised by Ms. Pena and the defendant concerning a conversation with a juror, and directed her to the District Attorney's office.

B. Standard of Review.

3. Three distinct issues are raised by the post-verdict Motion of the defendant: (1) invading jury deliberations in general; (2) introduction of extraneous information into jury deliberations; and (3) racial bias of individual jurors. C.R.E. 606(b) addresses these issues in a general manner:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his

> mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(1) Invading jury deliberations.

4. Long before adopting C.R.E. 606(b), Colorado law protected the sanctity of juror deliberations: "Generally, after leaving the courtroom, jurors could not testify to any matter concerning the intent or meaning of their verdict or their thought processes in reaching it." *Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002)(citing 19th Century Colorado cases).

> CRE 606(b) has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion.
>
> These purposes also underlie other Colorado law protecting the jury process. While a jury may change or modify its verdict up to the point the trial court accepts the verdict and discharges the jury, the court may not recall the jurors for this purpose once they leave the judge's control. "This rule helps to ensure that jury verdicts will not be tainted by any outside influence ... and promotes the finality of verdicts."

Id. at 322 (citations and footnote omitted). "During post-trial and appellate proceedings, courts must view the jury's verdict in the light most favorable to it." *Id.*

> CRE 606(b) protects the jurors in performing their public service and their post-verdict privacy. It acts to restrain disappointed litigants. The law presumes that jurors have followed the court's instructions and have discharged their duties faithfully.

Id. "Under CRE 606(b), as with our common law, we have excluded juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds." *Id.*

5. Notwithstanding the ability of counsel to discuss jury deliberations with a willing juror post-verdict pursuant to COLJI-Crim. 1:06, "none of this can become evidence unless one or both of the CRE 606(b) exceptions apply to the case." *Stewart v. Rice*, 47 P.3d at 325.

(2) Extraneous information.

6. The allegation of the jury's access to extraneous prejudicial information pursuant to C.R.E. 606(b) involves the following inquiry:

> These cases establish a two-part inquiry: first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective "typical juror" standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant.

> Answering this inquiry presents a mixed question of law and fact.

People v. Harlan, 109 P.3d 616, 624 (Colo. 2005).

7. The "typical juror" standard is intended to avoid inquiring into the actual effect of the information on juror deliberations (if any):

> Court inquiry into the improper introduction of extraneous information must comply with the narrow exception of CRE 606(b). Under CRE 606(b), the historical fact-finding of the trial court must focus on the circumstances surrounding the jury's exposure to outside information or influences and the nature of the information or influences to which it has been exposed. The court may not take into account testimony regarding the jury's deliberations, a juror's mental processes leading to his or her decision, or whether the extraneous information actually swayed any of the particular jurors' votes.

Id. at 625 (citation omitted).

8. "However, where the court is able to determine from the nature of the allegedly prejudicial extraneous information and the surrounding circumstances that the information is not inherently prejudicial, the court does not abuse its discretion in failing to question the jurors." *People v. Mollaun*, 194 P.3d 411, 418 (Colo. App. 2008).

(3) Juror bias.

7. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of

a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra.*
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 83 P.3d 1130, 1146-1147 (Colo. App. 2003)(citations omitted). "A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983) (citation omitted).

8. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

9. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information. We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added).

C. Legal Analysis.

(1) Extraneous Information – Fingerprinting.

10. During trial, Deputy Jeremy Nesvold was questioned extensively on cross- and redirect examination about the ability to take fingerprints from the light switch in the women's restroom facility where the assault took place, and his decision not to take fingerprints in this case, and a member of the jury (through the Court) followed up with a similar question. The issues involved the following:

a. Based on the victim's testimony that the defendant shut off the lights when he entered the restroom, Deputy Nesvold was asked on cross-exam whether he attempted to take fingerprints from the light switch, and he testified that he did not.

b. On redirect examination, Deputy Nesvold testified that prints are generally not taken when the area is open to the public, such as a light switch in a public restroom.

c. On re-cross exam, Deputy Nesvold was asked whether fingerprints would be attempted to be taken from an area that he knew the assailant had touched, even if that area was "public," and Deputy Nesvold testified: (1) He did not recall if the switch in the restroom was a "good surface" for prints; and (2) he did recall that the scene of the assault was under control and not a lot of people were around after the assault (to contaminate the scene).

d. In response to the juror's written question through the Court, Deputy Nesvold testified that a light switch surface was a "bad" surface in general, and that he simply did not try to lift a fingerprint from the switch.

11. The question overheard by Ms. Pena posed by the unidentified male juror to Deputy Nesvold following the conclusion of his testimony was (1) as a general matter, (2) how often fingerprints are taken in "this type" of cases (i.e., sexual assault).

12. Based on the nature of the question allegedly posed by the juror to Deputy Nesvold, and the extensive nature of the questioning of Deputy Nesvold at trial about the finger-printing issue, and the unequivocal response of Deputy Nesvold that he did not take prints for a variety of reasons, the Court finds that the nature of the allegedly prejudicial extraneous information and the surrounding circumstances warrant that the information is not relevant or inherently prejudicial to the defendant, *Mollaun*, 194 P.3d at 418, for the following reasons:

a. Although the Court would not have permitted the juror's "general fingerprinting in sexual assault cases" question to be asked of Deputy Nesvold while on the stand because such a question is not relevant to this case, the depth of questioning on that issue during direct and cross-examination was such that, in the Court's opinion, little, if any, question could possibly be left in the jury's collective mind about Deputy Nesvold's reasons for not taking fingerprints from the light switch, regardless of what he might have done in other cases.

b. Hypothetically, if Deputy Nesvold had answered the juror's post-testimony question by stating that fingerprints in such cases are rarely or never taken, then he would either (1) confirm his prior testimony on the stand, thereby not prejudicing the defendant, or (2) be making a statement which was inherently unbelievable to the juror, thereby discrediting his testimony regarding the thoroughness of the police investigation to the juror; again not prejudicing the defendant.

c. If Deputy Nesvold had answered the juror's post-testimony question by stating that fingerprints in such cases are usually or always taken, then he would be making a statement which discredits his testimony regarding the thoroughness of the police investigation to the juror, thereby not prejudicing the defendant.

13. Under any scenario, the Court finds that the information which could have been communicated by Deputy Nesvold to the unidentified juror (if any) would not be inherently prejudicial to the defendant, and therefore the Court will not permit any additional investigation into the information communicated (if any).

14. Based on this legal and factual analysis, the Court DENIES defendant's Motion for access to juror information regarding the post-testimony conversation between Deputy Nesvold and the unidentified juror.

(2) Juror bias.

15. As noted above, the fact that the jurors interviewed by defendant's attorney indicated that "other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic" is not relevant in a motion for new trial under C.R.E. 606(b) regarding whether such alleged bias *actually* affected the jury's deliberation. Actual juror deliberation may be not be opened for inspection, nor may post-verdict comments from jurors (pursuant to COLJI-Crim. 1:06) be used to invade the jury's *actual* deliberations. *Stewart v. Rice*, 47 P.3d at 322 & 325.

16. The inquiry underlying defendant's Motion is therefore limited to the determination of whether these unidentified jurors "deliberately misrepresent[ed] important information potentially relevant to a preemptory challenge or knowingly conceal[ed] a bias or hostility towards a party," thereby compromising defendant's ability to constitute a jury of his choice. *Black v. Waterman*, 83 P.3d at 1146-1147.

17. Based on this standard, and with the information available at this time, the Court is not prepared to provide the parties with "carte blanche" access to juror information in order to determine whether a violation of the defendant's due process rights has occurred. The Court will, however, proceed in the following manner in order to determine whether sufficient grounds under C.R.E. 606(b) exist in this case:

a. Attorney Cherry will supplement her Affidavit as to whether the two jurors with whom she had the reported discussion were male or female (in order that the Court may possibly limit the initial contact with jurors to one sex).

b. Attorney Cherry will then personally contact jurors in succession (with contact information provided by the Court) to determine only which jurors she spoke with alone after the other jurors left, and without disclosing to any jurors the subject of that conversation (i.e., that other jurors had expressed racial bias).

(1) The Court understands the difficulty and delicacy of this limitation on Ms. Cherry's inquiry with the jurors, but that is why this task is delegated to Ms. Cherry, personally, and not to an investigator or co-counsel. Ms. Cherry has the singular knowledge of the conversation that will permit identification of these jurors.

(2) If the two subject jurors are identified before contacting all of the jurors, the contact procedure will stop immediately. Similarly, if the subject jurors are both male and female, when a juror of one sex is identified, all subsequent contacts will be of the opposite sex only.

c. Ms. Cherry will then secure affidavits from the two subject jurors which will include and be limited to the following information:

(1) Identification (male or female) of each of the jurors (with name, if recalled) who expressed opinions about the defendant and/or the alibi witness (Maclovio Chavez-Chavez) which the subject jurors considered to be biased.

(2) The two jurors' best recollection of exactly what each "biased" juror stated about the defendant and/or the alibi witness. [Note: The Court is not concerned about whether the two interviewed jurors *believed* that the statements made by the other jurors were biased, as their opinions are part of jury deliberations and cannot be part of the Court's analysis per

Stewart. The only relevant information is the actual statements made by the "biased" jurors.]

(3) The two jurors will be instructed by Ms. Cherry that they are under Court order not to speak to any other person about this matter.

18. Based on the information then presented to the Court by Ms. Cherry regarding the statements of the "biased" jurors, the Court will then enter further Orders regarding how the investigation into the allegations of juror bias will proceed, if at all.

19. The preceding procedure will proceed in the following manner:

a. Ms. Cherry's supplemented affidavit will be provided to the Court no later than Monday, May 3, 2010.

b. The Court will provide Ms. Cherry with juror contact information for the appropriate group of jurors (i.e., male, female, or all jurors) within two business days of receiving Ms. Cherry's supplemented affidavit.

c. Defendant (i.e., Ms. Cherry) will file a status with the Court within thirty (30) days of this Order. If additional time is needed to complete this procedure, a timely Motion for enlargement may be filed.

d. The Court requests that, in addition to filing all information regarding this issue in "hard copy" with the Clerk of the Court, the parties send all information to the Court directly at: john.wheeler@judicial.state.co.us.

By Order of the Court this 28th day of April, 2010.

/s/ John L. Wheeler
John L. Wheeler
District Court Judge

Cc: All parties

SUPPLEMENT TO AFFIDAVIT OF KELLY C. CHERRY

Kelly C. Cherry, co-counsel of record for the Defendant in this matter, pursuant to this Honorable Court's Order dated April 28, 2010, states that both jurors she spoke with after the verdict in this matter were female.

Respectfully Submitted,

/s/ Kelly C. Cherry
Kelly C. Cherry, #40105
Attorney for Defendant

ORDER – Re: Defendant's Motion for Disclosure of Jury Information – II

Having received the "Supplement to Affidavit of Kelly C. Cherry" in accordance with ¶ 19.a. of the Court's April 28, 2010 Order, the Court implements the second phase of that Order, pursuant to ¶ 19.b.:

> 19. The preceding procedure will proceed in the following manner:
>
> > b. The Court will provide Ms. Cherry with juror contact information for the appropriate group of jurors (i.e., male, female, or all jurors) within two business days of receiving Ms. Cherry's supplemented affidavit.

1. Defendant's counsel may pick up the juror identification information for the six (6) female jurors on Monday, May 3, 2010, in Division 206. This information will remain confidential to defendant's counsel (i.e., no disclosure to the defendant).

2. Defendant's counsel will then implement the procedures outlined in ¶ 17.b. and c. within the time frame set forth in ¶ 19.c. of the 4/28/10 Order.

By Order of the Court this 30th day of April, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People:	MINDY KRUSEY, ESQ.
For the Defendant:	MICHAEL MEYRICK, ESQ. KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Monday, May 3, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, MONDAY, MAY 3, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with Mr. Pena.

THE COURT: I just handed Ms. Cherry the second phase of the new trial information regarding names of the six female jurors, and by the Court's order last week – or the week before – regarding the parameters of the questions that may be asked and the information taken from who you identify are the two jurors that you spoke with. You're going to have to do it by telephone so you don't actually recognize them. I'm sure that could be done. As I indicated, the questions have to be quite circumspect as not to suggest to any of the other jurors that someone may have said something that the two identified jurors believe was racially biased. But I don't want to start ringing bells with other jurors, obviously.

So once they are identified, that information will be gathered and turned in, and we'll proceed from there.

MS. CHERRY: I understand.

[3] THE COURT: All right. And I actually have a – or I've got hard copies just so we don't have to go through the mail process. I did e-mail them. These are hard copies of that last order that I sent out indicating that I would give you that envelope.

MS. CHERRY: Thank you, Your Honor.

THE COURT: I have received and reviewed the adult sex offender pre-sentence report. Has everyone gotten a copy of it?

MS. KRUSEY: Yes.

MR. MEYRICK: Yes, Your Honor.

THE COURT: Are there any additions, corrections, anything that needs to be added or subtracted from this that is not accurate, as far as you're aware?

MR. MEYRICK: Your Honor, it's my intention to move to continue the sentencing until this issue is resolved. My problem is that my appellate period is going to start running today if we sentence him today. And I've only got 45 days. I'm not sure we're going to resolve this. Even if we do, it may leave me a couple of days at the end of that.

THE COURT: Good point. As of today, there would be 30 days on my order running –

MR. MEYRICK: Right.

[4] THE COURT: – as far as gathering this information.

MR. MEYRICK: Yes.

THE COURT: That's pushing the appellate period pretty hard.

MR. MEYRICK: Yes.

THE COURT: What's your position?

MS. KRUSEY: Your Honor, that's fine. Our victims did not wish to be present for sentencing. We could set it over at the Court's convenience. And also, too, with regards to the hung counts, I would want to make a determination whether we're dismissing that, to see where this goes. I don't want to dismiss that count with any kind of prejudice until I know a new trial may happen.

THE COURT: Okay.

MS. KRUSEY: I wanted to make a brief record on a couple other points at the Court's pleasure.

With the first issue regarding Deputy Nesvolt, you're taking issue with that according to the Court's order. We did have an investigator from our office speak with Deputy Nesvolt regarding that issue. He prepared a memorandum. I provided that to counsel this morning. And if I may approach the Court, I'll provide a copy for the Court's record [5] for any future issues.

THE COURT: Thank you.

MS. KRUSEY: In summary, essentially states that he did recall a gentleman with a juror badge. He couldn't tell if it was from our jury or not. He couldn't remember what they looked like. A gentleman approached him, started to ask him something. He said, "I can't talk to you," and walked away. He did state that he came over and was talking to myself. He can't remember, he may have mentioned to me about it. My recollection is, I don't remember him saying anything about that. I certainly – my common practice, if anything like that happens, would have brought it up to counsel and the Court if anything like that happened. I don't have any recollection of him saying that to me. He couldn't remember one way or the other according to the interview with the investigator.

The second issue, the People do have – I respect the Court's order – but the People do have some concern with essentially it's just defense counsel themselves making this juror contact. There's no one from my office – not myself or anyone involved in my office – that's going to be present during the conversations.

[6] And so we have an issue that's hanging in the balance of whether a defendant gets a new trial, potentially, and the only person having contact with these jurors at this point is defense counsel.

And, you know, I mean absolutely no disrespect in making this record that Ms. Cherry is an excellent attorney and she would be honest. It's concerning to myself it's only defense side that's having any of this contact. It's defense issue if he gets a new trial, which is a huge issue in this case.

THE COURT: Well, please rest assured we are in the second of three preliminary phases here. The first phase was the report by a juror concerning another juror in which the affidavit of the attorney was presented.

The second phase will be actually finding out what that first juror overheard only. That affidavit, as if it were the same information that was being transmitted to Ms. Cherry. So, in my opinion, that would be at the same level of initial reporting. But it has to come from the juror. If based on that I determine that we need to go forward, you will have access to those jurors on the stand, and those jurors will then tell us as if they [7] had come forward initially saying – come forward to the Court, for instance, saying, "I heard this information," we would then have put them directly on the stand so everybody had access to them. Until I'm convinced that this is not someone – merely someone's opinion of an innocuous comment that was made, until I find out exactly what they heard, not what they interpreted – because we will not be invading the deliberations of the jury about opinions and interpretations – only what was said. And once they report to the Court what was said, then I'll make a determination if this was, as I say, something innocuous, in which case we'll go forward, or with sentencing. Or if it is something more serious, in which case we'll have those people on the stand, the people who actually said the comments. And if we have to have an intermediate step with the jurors who had reported it, we'll do that as well.

But we're truly in the preliminary phase of this. Please don't be concerned that you won't have access to them. I need to find out if they are going to be standing by what they believe they heard or not.

So with that said, I agree that – and by [8] default it appears no one is objecting to continuing this, and it's probably appropriate because, I think you're right, we would be burning appellate time, and we don't know if even 30 days will accomplish this. I'm confident Ms. Cherry is not going to take 30 days to do this, although you have that time. But as far as we get, we will do that.

We probably need to set a status, I would think, as opposed to actually resetting sentencing. Although if you don't have anyone coming in, it doesn't matter.

MS. KRUSEY: If we could set a status in case they change their mind. A lot of that is based on the work and trial schedules. They may change their minds.

THE COURT: Why don't we try to go out about 30 days then, just for a status. How about Thursday or Friday, June 3 or 4, any time. I don't think it will take long to figure out where we are.

MS. KRUSEY: Either of those work for me.

MS. CHERRY: I could do it the 3rd, but not the 4th.

MR. MEYRICK: The 3rd works for everybody, it appears.

THE COURT: What time? 8:30?

[9] MR. MEYRICK: Sure.

THE COURT: That would be perfect. If you could do a setting slip. They are under the podium.

And I will move as quickly as I can, as soon as I get anything, but please understand those yellow stickies are the dates that I will not be here. As of May 20th through June 2nd I'm not going to be here. So if it is possible for you to do what you need to do here to find these people, that would sure help me. Otherwise it's going to occur during the two weeks I'm gone.

MS. CHERRY: As soon as they are responsive – I don't think it will be a problem.

THE COURT: Anything else for Mr. Pena-Rodriguez?

MR. MEYRICK: No, thank you, Your Honor.

THE COURT: Thank you very much.

(The proceedings this date were concluded.)

SUBMISSION OF AFFIDAVITS

• Kelly C. Cherry, co-counsel for the Defendant in this matter, submits the attached Affidavits pursuant to this Honorable Court's Order dated April 28, 2010.

Respectfully Submitted,

/s/ Kelly C. Cherry
KELLY C. CHERRY
Attorney for Defendant

AFFIDAVIT OF [M.M.]

[M.M.], of lawful age and duly sworn upon her oath, states as follows:

1. I was a juror at the trial in the above-captioned matter.
2. During jury deliberations, one of my fellow jurors, [H.C.], made the following statement concerning the Defendant:
    a. "I think he did it because he's Mexican and Mexican men take whatever they want."
    b. Mr. [C] made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

/s/ [M.M.]
[M.M.]

AFFIDAVIT OF [L.T.]

[L.T.], of lawful age and duly sworn upon her oath, states as follows:

1. I was a juror at the trial in the above-captioned matter.
2. During the first day of jury deliberations, juror [H.C.] made statements concerning the race of the defendant. Paraphrased, those statements were as follows:
    a. He believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.

    b. He said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.

    c. He said that he did not think the alibi witness was credible because, among other things, he was "an illegal."

Further the affiant sayeth naught.

REPORTER'S TRANSCRIPT

The Hearing in this matter commenced on Wednesday, June 3, 2010, before the HONORABLE JOHN WHEELER, Judge of the District Court.

APPEARANCES:

FOR THE PEOPLE:	PATRYCE ENGEL, Deputy District Attorney
FOR THE DEFENDANT:	JAMES O'CONNOR, Public Defender

[2] THE COURT: 2007-CR-2311, People versus Miguel Pena-Rodriguez.

MS. CRUSEY: Mandy Crusey for the People.

MR. MEYRICH: Michael Meyrich and Kelly Cherry for Mr. Pena-Rodriquez.

THE COURT: The question stands. Where do we stand?

MS. CHERRY: I submitted the e-mails last week to you and the district attorney.

THE COURT: I'm sorry, I just haven't gotten, wasn't able to get to them.

MS. CHERRY: That's fine, Your Honor. I think that Ms. Crusey's in the same position just returning from a vacation and not having reviewed them.

MS. CRUSEY: That's correct. I was just able to pull up the e-mail right now so I'm in the same boat.

THE COURT: What that does is trigger the response period and having just returned I can't – they did come in on the 28th or very close to that date. My recollection was we got – did I provide 15 days for response or 30? I looked back last night into the record orders and now I can't remember.

MS. CHERRY: The order I've reviewed, Your Honor, I don't think has a date for response.

THE COURT: I thought I gave a period of time, [3] though.

MS. CRUSEY: I don't know if we discussed this stage of it, Your Honor, because we weren't really sure if there was going to be a response necessary. I think at this point I think it depended on what the affidavit said.

THE COURT: And you haven't had a chance to review it or at least enough of a chance. Let me just quickly run through this. I thought I provided a response period, not obviously a fixed date because you didn't know when it would be, but let me quick look here. Well, perhaps I didn't. I thought I did, guess I didn't. Well, how do you wish to proceed then, Ms. Crusey?

MS. CRUSEY: Your Honor, it would be the People's position that it's not necessary to delve any further into this issue so if you want us to file a written brief in regards to that or however you want us to respond.

THE COURT: Well, if you wish to file anything then that's fine, I'll review it. I haven't seen it yet, but I will review it and rule as quickly as I can.

MS. CRUSEY: I mean, I guess to clarify, I know when we were here before you had talked about kind of certain phases and the second phase may be that we [4] would pull these jurors actually into the courtroom and take testimony from them. It would be the People's position that it's not necessary to move on to that phase, that based upon the affidavits this is not sufficient for a motion to do any further inquiry.

THE COURT: That's what I would be reviewing is that issue if we need to pull them in and I would make that decision and if you feel there's no – nothing left further to do than for me to look at the affidavits and make that decision, I'll do that and then if we do pull them in, of course we'll set that up and go forward in that manner.

MS. CRUSEY: I guess – I would like to, I guess, file a – I can't imagine it'd be very long but maybe something in writing why I don't believe it's necessary to pull the jurors in and Your Honor can review that and take it for what you will.

THE COURT: That's fine. What period would you like?

MS. CRUSEY: If I could have maybe two weeks to do that or is that too long?

THE COURT: I'd like to have it by the end of next week.

MS. CRUSEY: Okay.

THE COURT: I mean, that's the better part of two [5] weeks but I'd like to have it by Friday.

MS. CRUSEY: All right.

THE COURT: So it would be Friday the 11th, end of business.

MR. MEYRICH: Your Honor, if we could have just a few days to respond to that.

THE COURT: Sure, that's fine. Would you need later than, say, the 16th or 17th?

MR. MEYRICH: No.

THE COURT: All right. Let's say the 17th then. June 11th for any brief by the People and June 16th for a response by the defense and then I'll rule as quickly as I can after that as to whether we'll bring these people in.

MS. CHERRY: Your Honor, if I could just advise the Court, in speaking with one of the jurors it's my understanding that she is relocating soon to Texas, so I don't know if it's possible that if we do proceed to the second phase for her to be able to participate by telephone or some kind of phone correspondence.

THE COURT: That may work.

MS. CHERRY: Okay.

THE COURT: How soon?

MS. CHERRY: My understanding was it's within the next couple of weeks so I think if it goes as she plans [6] she'll be gone by the time we get to that point.

THE COURT: I should get that e-mail. And are there attachments to it?

MS. CHERRY: There are.

THE COURT: Okay. That's all I would need then because the hard copy hasn't been filed yet. Anything else we need to do today? Do we have a date when Mr. Pena-Rodruguez will be here or are we still waiving his appearance for these?

MR. MEYRICH: He is here.

THE COURT: Oh, he is here, I'm sorry. Standing right there, I'm sorry. Let's set this again for status and see if I have any information by the 16th. I'd say sometime the week of the 21st. We're going to be in trial so we would do it as early as we possibly can.

THE CLERK: 24th at 8:15.

THE COURT: June 24th at 8:15. I anticipate it'll be fairly quick. We may be picking a date then so be sure and bring your calendars.

MR. MEYRICH: Okay.

THE COURT: I'll have the written order by e-mail to you prior to that date. Anything else?

MR. MEYRICH: No, thank you, Your Honor.

THE COURT: Thank you very much.

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People:	MINDY KRUSEY, ESQ.
For the Defendant:	MICHAEL MEYRICK, ESQ. KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, June 24, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, THURSDAY, JUNE 24, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick, appearing with the defendant.

MS. CHERRY: Kelly Cherry on behalf of the defendant.

THE COURT: And from what I see here, we have information in place for me to make this decision. Is that what the parties understand? As far as I've got, I have the affidavits from two female jurors, the parties have seen. And then I have three briefs. I've got the People's B-3 regarding juror bias, defendant's response brief. I just wanted to make sure because they are a little slow getting up here from the clerk's office.

If this is everything – actually, I reviewed it last night, but this is a serious enough matter that I feel it deserves written orders, so that if either side wishes to do something, it has something in writing rather than just ramblings from the bench.

I'll do this by the end of the weekend for sure. If I get to it tonight or tomorrow, I will. [3] But by the end of the weekend for sure.

So let's set a date probably as quickly as we can. It's not real quick on our calendar.

COURT CLERK: I have July 20th, afternoon, anytime in the afternoon. I can do July 19th probably, if I do it like three o'clock.

THE COURT: Depending on the order, if we need to speak with this gentleman, what would you anticipate? I've never done this before. I think it's done rarely. So rarely for someone on the bench for a long time, let alone someone on the bench three-and-a-half years, I'll have to look into that a little bit more. I'll deal with that in the order. I think that's the best way to do it, if that's the way this goes.

I will tell you, I've read everything. I'm still thinking about it. I'll make the decision in writing and e-mail it to each of you.

MR. MEYRICK: I can't do the 19th, but I could do the 20th.

THE COURT: I have no idea what the procedure is. I have yet to find anything about it.

MS. KRUSEY: And then also as far as any kind of argument on a motion for new trial, as far as my brief is concerned, I kind of felt we were putting [4] the cart before the horse, because one had never been filed.

So if this is set for 1:30 July 20th, if we do have a hearing –

THE COURT: We'll do this first before we get to a motion for new trial. If there is, that would be plenty of time to deal with that, having the motion for new trial, if that's the way my ruling goes. You have 30 days, a couple of weeks for a motion, if that's the way it goes. There would be plenty of time for argument.

Anything further for Mr. Pena today?

MR. MEYRICK: No. Thank you.

(The proceedings this date were concluded.)

ORDER – Re: Defendant's Motion for Disclosure of Jury Information – III

Having received the affidavits of the two female jurors who contacted Kelly C. Cherry, Esq., in accordance with the Court's April 28 and April 30, 2010 Orders, the Court provides the following analysis of the "Defendant's Motion for Disclosure of Jury Information," including the responses from the prosecution and the rough draft of the 2/23/10 *voir dire* at trial:

A. Standard of Review – Juror Bias.

1. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to

> a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra.*
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 82 P.3d 1130, 1136, 1137 (Colo. App. 2003)(citations omitted). "A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983)(citation omitted).

2. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

3. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information. We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added). Consequently, whether or not all jurors unanimously agreed on their "guilty" verdict does not affect the Court's analysis of whether a juror intentionally or inadvertently concealed a bias toward the defendant, and if so, whether that action warrants a new trial.

B. Factual Background.

4. The following scenario resulted in the jury's verdict against the defendant:

a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia*, the following question:

> 8. Friends or relatives in law enforcement? [Juror No. 11 answered, "Friends."]
>
> 17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? __ If yes, please explain. [Juror No. 11 answered this question, "no."]

c. The jury venire was then sworn by the Court and voir dire began. During *voir dire*, the only individual question asked of Juror No. 11 was in response to a general question by the Court as to whether any of the jurors "had law classes of any kind?" Juror No. 11 stated "real estate and contract law," and assured the Judge that he could put that knowledge aside for the trial [Transcript at 21].

d. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although several other jurors disclosed friends and/or acquaintances who are (and who had been) law enforcement officers, Juror No. 11 did not disclose any current or previous law enforcement service [Transcript at 29-30]. Further, notwithstanding his answer on the questionnaire to Question No. 8, Juror No. 11 did not raise his hand regarding this question.

e. Defense counsel inquired of the entire venire whether "this is simply not a good case for them to be a fair juror." No jurors (including Juror No. 11) made any response.

5. Based on the information sworn to by two deliberating jurors, the following statements were allegedly made by Juror No. 11 during deliberations:

a. The juror stated that, "I think he did it because he's Mexican and Mexican men take whatever they want."

b. The juror also made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

c. The juror made statements that the defendant was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.

d. The juror stated that, where he used to patrol, nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls.

e. The juror stated that he did not think the alibi witness was credible because, among other things, he was "an illegal."

C. 7/20/10 Status Conference.

6. Attached please find the rough draft of the *voir dire* examination by the Court and counsel on February 23, 2010.

7. The Court intends to discuss the facts set forth above in the context of the law presented at the Status Conference on Tuesday, July 20, 2010 at 1:30 p.m.

By Order of the Court this 19th day of July, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People:	MINDY KRUSEY, ESQ.
For the Defendant:	MICHAEL MEYRICK, ESQ. KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Tuesday, July 20, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, TUESDAY, JULY 20, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with the defendant, who appears.

THE COURT: We're at the point, I believe, where we need to make some decisions. I forwarded a rough draft of the *voir dire* to the jury, plus all the additional information that I have gleaned from the record.

The balance of it as follows: I'll just read from what I've written so far. And – well, actually, this was all sent to you. I apologize.

I've been working on this for so long I forgot whether I sent it or not, but I did.

This is all the information that I was able to find, either in written or spoken form during *voir dire,* whether it was in a questionnaire or from the oral questions that were asked and responses given by the Court and by counsel.

And in that information, a couple of things were apparent. One is that I do not believe that regarding the questions concerning fairness that either juror No. 11's answer to question 17, [3] "difficult for you to be a fair juror" to which he answered no; and the question that was asked later by defense counsel, if this is simply not a good case for them to be a fair juror, to which no one raised their hand, including juror No. 11, I don't think that is sufficient to hold juror No. 11 as misrepresenting, which is what the standard here is.

This has been very difficult to analyze. I've not had to analyze this issue before, and I found it extremely difficult to separate what was said in the jury room, which prompts this inquiry, from what we are allowed to consider once we start our determination of this issue, which cannot rely on anything that was said in the jury room. That may trigger an investigation. But based on what has been said cannot be the focus of the investigation because what happens in the jury room we cannot invade.

So the fact that juror No. 11 appears to be biased based on what he said in the jury room, unless he answered a question in *voir dire* or misrepresented or withheld information, that will not form the basis of a new trial on that issue. I do not feel that there is sufficient information here. I'm happy to take argument on that point. [4] But let me finish the argument.

The second issue here, whether or not this gentleman had prior law enforcement experience is a separate issue. Based on his – on the statements that he made in the jury room, it appears that he did have such experience. The question is whether or not any inquiry was made prior to that during *voir dire* which he might have misrepresented that fact.

The key issue being, as indicated in the case law, that both sides have a right to exercise their peremptories as they see fit and not in retrospect. Not saying might have or might not have, but the presumption is if there was a misrepresentation on a material issue, and that option was not presented, that can be grounds for a new trial.

The question that was asked – and I did not conduct this *voir dire* – but my question in my script being slightly different; and, in fact, the question in Judge Antrim's script, which we checked, is slightly different than the question she actually asked. The question in her script "or have you ever been," was not asked, the question being "Are you, or any member of your family or any close acquaintance a law enforcement officer?"

[5] Now, juror No. 11 – there were many jurors who answered the question. Juror 11 did not answer that question. There were many answers by other jurors in that *voir dire* about former law enforcement experience, people who had been, that they knew law enforcement officers.

And the question I have to answer is whether or not given not only the question that was asked, but the context of the question given all these other answers by other jurors, is whether that was sufficient to put juror No. 11 on notice that if, in fact, he had been a law enforcement officer in the past, indicating that he had friends who were, in another question, is that enough? If it is enough, then we would have to decide what to do.

The only question that can be asked of juror No. 11, should he come in here, unless I change my mind on this issue of fairness, which I simply thought very long and very hard about that separate issue of fairness question, but is, why he did not answer when asked, "Are you or any member of your family or close acquaintance a law enforcement officer given the context of the other jurors answering questions about former friends – or former or friends who had formerly been law [6] enforcement officers. And he can say one of many things. He can say six-and-a-half months ago he has no clue; he doesn't remember; or, he remembers the question, didn't understand it; or he did understand it and took it literally that he was not presently a law enforcement officer, even though other people were answering questions about former law enforcement officers, and decided to keep that to himself.

So that's how I see this right now. And I'm willing to take – I've not made a decision because that's why I wanted to deal with this today. But is there any other way you want me to address this? Or any other things you want me to look at?

MS. KRUSEY: Well, Judge, I think respectfully with the question of the second part of your inquiry, law enforcement experience, I don't see how we can fault a potential juror for taking a question from the Court as Your Honor's *voir dire* is conducting it, at that point how we could fault the juror for taking her question at face value.

From the transcript, the question is phrased as present tense law enforcement. And so I think we have – a lot of times when we're picking juries, certainly have – a lot of times I've seen myself [7] where jurors raise their hand and give information is not necessarily in response to the question being asked, it goes outside what we're asking, but compelled they should say something. I don't think that jurors doing that where essentially – and I haven't had the opportunity to review the transcript of the *voir dire* yet, Your Honor –

THE COURT: By the way, I sent it to you the minute I got it. It just so happened we had this hearing scheduled.

MS. KRUSEY: I understand. And I apologize that I wasn't able to. I was out of the office yesterday afternoon and in court this morning.

But I don't see how we can make it incumbent upon other potential jurors to answer a question not being asked of them just because other potential jurors feel compelled to add some additional information or make additional responses. I don't think that we can establish that he's misrepresenting anything when he had no reason to answer a direct question being asked of the venire. The direct question is whether it's prior – whether it's present law enforcement experience. And by the affidavits, he's not presently a law enforcement officer. It said clearly in the affidavits in his [8] past, an ex-border patrol, or something along those lines.

THE COURT: Also says in the questionnaire, friends or relatives in law enforcement. He answers yes, he essentially answers friends, he says, answering yes.

MS. KRUSEY: Yes.

THE COURT: Now, he still doesn't answer this question, "Are you or any member of your family or any close acquaintance a law enforcement officer?" even though he acknowledges friends who are. And does not respond to that question. That also concerns me.

MS. KRUSEY: The question that's on the written juror questionnaire, No. 8, is just that segment, friends or relatives in law enforcement?

THE COURT: Unfortunately, it is the stock questionnaire. That's all it says. That's it.

MS. KRUSEY: Okay. Without having it in front of me and having more context to it –

THE COURT: I don't think the questions on either side – I have it right here.

I think the questions on either side are non sequitur, no logical order to these questions, as I recall, unfortunately. Section 8, No. 7, your level [9] of education, including any legal training. And No. 9, it is sort of a sequitur, "Have you or a family member ever had a good or bad experience with a police officer?" So there is some segue there from 8 to 9, but not 7 to 8. But no more than that.

Well, Mr. Meyrick, Ms. Cherry, what's your position?

And given I assume what your position will be, what do you want to do?

MR. MEYRICK: That's a good question.

THE COURT: Let's assume we know your position.

MR. MEYRICK: I think you probably know my position. But I'm not as convinced as the Court the fairness issue has been dealt with. I think that the fairness issue is not just limited to what I view as concealment of an important fact that could have led to further discussions, possibly a challenge for cause;

at a minimum, a peremptory challenge. But Judge Antrim went through the entire jury panel with people who were volunteering information about that. And despite the fact that he indicated he had friends in law enforcement, he didn't participate in that.

Now, in and of itself, I would agree that's not [10] enough. But in the context of all the other people who were disclosing issues, and at the very end of it, the Judge, at Page 38, says one more time to the entire panel, "Have I missed anyone?" And there's still no disclosure. And then she moves on to the presumption of innocence and says, you know, "The defendant is presumed innocent. Is there anybody who cannot accept that?" Is there – and then she offers – and she said, Now, you may not want to discuss this publicly. So I'm offering, the Judge talking, I'm paraphrasing – but what she says, I'm offering to talk to anybody privately about this issue if you have a problem with the presumption of innocence. And so I think that that does go to the fairness part of it. I mean, she gives the panel a second opportunity after she's been through each and every hand, and had discussions with a minimum of three jurors about former law enforcement officers and whether or not that can color their perception of the case, and whether or not they could still be fair based on all that, and still we have nothing from him.

So I think taken in context, that both the fairness issue with regard to the presumption of innocence, and the possible intentional concealment [11] of the fact that he himself was a former law enforcement officer, because then she says at the very end he has two opportunities, one from the Judge and one from me.

She says, "Now, is there anything we haven't discussed that you think that we should know?" And, again, there's silence.

And when I did my portion of the *voir dire*, that's the last question I ask of any jury panel, is there anything that we haven't talked about? Is there anything that you think we need to know about? Even if we haven't addressed this directly, is there anything else that you think we should know about, whether or not you are the best juror for this case?

So all of those things together I think do give some cause for us to pause about this fairness issue, as well as the concealing of the law enforcement officer/former law enforcement officer status.

THE COURT: Before you go on, on that fairness issue, as far as the catch-all, whether it's Judge Antrim doing it or you doing it, that gives people, in my opinion, an opportunity to volunteer information, but does it impose an obligation to say something that they should have said before? Or does that require a more specific question? The [12] case law on the fairness issue of bias seems to require more specific questions. There were no questions asked about the defendant's ethnicity, about anyone – it almost always happens for some reason in cases involving criminal cases, in my courtroom anyway, in the last three-and-a-half years involving African-American defendants, there will almost always be a question about that. One reason I think is because our jury panels are noticeably deficient in African-American jurors. Not so much on Mexican-Americans or jurors of Hispanic decent [sic]. But certainly there's a much larger population in Denver with a larger African-American decent [sic] base that comes into the courtroom.

So those questions are always asked. Why in this case was such a question not asked, don't know and don't care, whether it was intentional or not to ask such a question in *voir dire*. But, I think it takes more than that just to say "Can you be fair?" because I would fully intend, although this question would never be asked of juror No. 11 because we cannot invade jury deliberations. But if we were to ask, "Why did you say those things?" I'm absolutely certain what he would say was, Oh, that's my experience. I'm not trying to be unfair. That's [13] just my experience. Well, that may not carry a lot of credibility with anyone except for in his own mind, but he may very well have thought that he was being totally fair and answered the question honestly. If it had been asked of him, whether a question which cannot be asked, but still if we were asked that question, he would probably say no, I was totally fair. That's just my experience. Whereas, an objective party would say no, you're biased. If we were asked that question in *voir dire* about Mexican-Americans or people of Hispanic decent [sic], males, he may very well have said the same thing and been a strike for cause. But he wasn't asked that question; only, "Are you being fair?"

So that's why I draw a distinction between – let's say, hypothetically, the question had been asked correctly, "Are you or have you ever been," and he had said nothing, I see that as a quantum difference between that and the fairness issue. He had misrepresented for one reason or another, or by his silence misrepresented; whereas, fairness, it's too soft. It's just even if the question, "Do you have any biases," that would even be a better question than fairness. But I have great difficulty with that one of overturning a jury verdict based on [14] that. Whereas, the law enforcement issue, the only issue that we need to get past there in order for then this to be totally in the Court's discretion, is whether or not, "Are you a law enforcement officer?" In the context that that question was asked and answered by others, should have given him understanding that he needs to raise his hand and say something. Then it becomes my decision, as indicated in the case law, that can be the basis. Will it be? That's my decision. But that undoubtedly can form the basis because the defense must have the opportunity of not saying gee, we would have drilled down and found all this out. But just the fact that he was a cop, do I want him on my jury? There were no other police officers on that jury.

So that's how I look at this. And, as I say, as far as what you want to do, if I were to rule that that question in its context is sufficient to have caused him to say something and should have said something, do you want to bring him in here? Hypothetically. If that's what I decide.

MR. MEYRICK: Yeah.

THE COURT: Because you bring him in, the question is very limited, very limited. There will [15] be no bias question.

MR. MEYRICK: Right. I understand.

THE COURT: And that's something I need to rule on and counsel needs to talk about it. If I do not rule that it is sufficient, then the issue is over and you go to another court. But if I rule that it is sufficient, then we have to decide what to do with this gentleman.

I have no great desire to talk to him. But, as I say, the answers – you can put them on your hand. Either he remembers it and he concealed it. I doubt he's going to say that. He might, but I doubt it. I don't remember anything about this. It was too long ago. I would say there's a 50/50 chance he's going to say that; or, I didn't understand – or the third is, I didn't understand the question. Or, I answered it completely honestly. I'm not a police officer. So it's one of those four things. If that's all he's going to say, and depending on how each side wants to react to that if we bring him in, do we need to bring him in?

MR. MEYRICK: And I guess since the Court's the one that has to make the decision, if the Court feels that there's adequate information in the existing record to make a ruling either based on the [16] context and the questioning as a whole, or –

THE COURT: I think I have.

MR. MEYRICK: – or if the Court wants more information.

THE COURT: I have to give him an opportunity to explain. If we're going to overturn a jury verdict, I have to give him the opportunity to explain unless counsel feels it is immaterial whatever he would say.

MS. KRUSEY: Your Honor, my position would be – well, obviously my position is we don't go past anywhere today.

THE COURT: I haven't made that decision. I don't want to have another hearing on this.

MS. KRUSEY: I understand. As much as I don't want to, if we would go past today, as much as I don't want to have to go to a hearing or anything, I kind of feel we have to. If the Court is going to make a determination whether or not there was a material misrepresentation or concealment, I think he needs to be asked that question. We need to hear his answer. Otherwise, I don't know how the Court necessarily can – if Your Honor feels that more information needs to be taken, can make that determination without more, if you do think there is [17] something there, something maybe hiding why he didn't respond when others were responding, I don't see how we get past that without him coming in and answering that question, because he's the only one that knows.

I think Your Honor is absolutely correct, there's about four possibilities. And obviously counsel and I will argue where the possibilities fall.

THE COURT: Let me make a decision then and – I'm just going to make it.

I believe that in the context of that question that was asked, it should have been clear enough to juror No. 11 that he should say something. If there was any – certainly it occurred to him – unless he simply didn't hear the question, didn't understand the question, it was a fairly straightforward question. But if he didn't hear it or some reason didn't understand it, I believe the thought should have run through his mind and a decision was made in his mind that he would not answer the question because he was not presently a law enforcement officer. And after – or several other people, at least two, if I'm not mistaken – three people talked about acquaintances who used to be law [18] enforcement officers, why that didn't trigger his saying something, that he was in exactly the same position. That if he heard and understood the question, that had to have gone through his mind. And he had to have made a decision that he would not say anything. And, to me, that means we've got to talk to him.

So we'll set up a time to do this. I think the appropriate way to do this is to have my clerk or bailiff contact him rather than one party or the other, unless you disagree.

MR. MEYRICK: No. I think it would be inappropriate for either the prosecution or the defense to talk to him about this issue.

THE COURT: Then we'll bring him in. And I will, in the meantime, create a list of questions for him that I will ask him. I will let counsel follow up. But I'll give you those questions in advance. And if you want to make suggestions, that's fine. But I'll give you those in advance so we know exactly what we're going to do with him and what we're not going to do with him. And we'll do that as quickly as we can. I can't imagine in this sort of circumstance that I don't have subpoena power to do that. But I'll look or I'll research [19] it. I just doubt he'll have a problem with this. I'm obviously not going to tell him in advance what we're going to be doing. And as far as he's going to be aware, all this has to do with – unless somebody else has talked to him, I don't know – is going to have to do with whether or not he's a law enforcement officer.

Now, Mr. Meyrick, I will give you something more in writing strictly on the fairness issue. I think that deserves to be in writing if you wish to appeal it. If we bring him in –

MR. MEYRICK: It can wait, I think.

THE COURT: I thought long and hard about this. When we ask him if he comes in on the fairness issue, you can't go into *voir dire* again. All you can ask him, "Are you fair?" And what's he going to say? So you can't drill into it. So, again, as you say, perhaps it doesn't matter. And we'll wait on that one. But I will preserve your record with an order.

Okay. We're going to have to figure out a time with juror No. 11 first.

COURT CLERK: Because the defendant is on bond, we have to have a date certain for him to come back.

THE COURT: Why don't you look for a date. If [20] we can't do it on that date, we'll change it. We'll set a date.

THE COURT: August 12th.

MS. KRUSEY: Fine with the People.

MR. MEYRICK: Okay.

THE COURT: Will that work?

MR. MEYRICK: Yes.

THE COURT: If it's going to be different than that, I'll call, because we'll have to get ahold of juror No. 11.

MS. KRUSEY: And just to let the Court know, my last day with the office is actually this Friday. So Jacob Edson, who originally had this case and I covered it for him, he will be taking this back from me. So I have his calendar with me. I brought it, and it's fine with his calendar. But for any future communications, it will be with Mr. Edson. I wanted to make the Court aware. And I let Mr. Meyrick know as well.

THE COURT: Okay.

All right. I'll get this out as quickly as I can on this fairness thing. But we will contact juror No. 11 and make every effort to do it on that date and time. And if it's going to be any different, if he's not in town or something like [21] that, we'll notify you and schedule another time.

MS. KRUSEY: Okay.

THE COURT: Bond is continued until that date.

Thank you.

MR. MEYRICK: Thank you, Your Honor.

(The proceedings this date were concluded.)

* * * *

Memo to File:

Date: July 25, 2010

To: File

From: John Wheeler

Re: 07CR2311 – Pena-Rodriguez

1. During jury selection on this case (*P. v. Miguel Angel Pena-Rodriguez*), you filled out a written Juror Questionnaire before coming up to the courtroom for the *voir dire* procedure. [Give Mr. C a copy of his Juror Questionnaire.]

2. Among other answers, you answered one particular question in the following manner:

8. Friends or relatives in law enforcement? Friends

3. After the jury panel came up to the courtroom, the entire jury panel was then sworn by the Court and *voir dire* began. During *voir dire*, you raised you hand to answer a general question by the Court as to whether any of the jurors "had law classes of any kind?" You answered that you had "real estate and contract law" classed, and assured the Judge that he could put that knowledge aside for the trial.

4. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although you had indicated on your questionnaire that you did have "friends" who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond at that time?

5. Other jurors also responded that they had friends who formerly were in law enforcement. Why did you not inform the Court that you had formerly been a law enforcement officer?

- Do you recall the question?
- Did you understand the question?
- Did you make a decision not to inform the Court about your prior law enforcement service?

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People:	JACOB EDSON, ESQ.
For the Defendant:	MICHAEL MEYRICK, ESQ. KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for post-trial hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, August 12, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, THURSDAY, AUGUST 12, 2010

THE COURT: 07CR2311, the People versus Miguel Pena-Rodriguez.

MR. EDSON: Jacob Edson for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with the defendant, Mr. Pena-Rodriguez, who appears on bond.

THE COURT: All right. We have Mr. [C] waiting in the wings out there. And my proposal is this: I've given counsel an outline of my questions for Mr. [C]. And based on my research, it's quite clear to me that the only issue that I will address, and that counsel may address after I finish, is the issue of whether or not the issue of his disclosures, both on the jury questionnaire and in direct response to the Judge's questions – Judge Antrim being the only person who asked questions about these particular issues of his disclosure concerning – or failure to disclose that he had previously been in law enforcement.

What is also clear in my research was, No. 1, no issue that was directly addressed by the other jurors concerning Mr. [C]'s alleged bias can be addressed here. That information was only raised in deliberations and cannot be the subject of any [3] inquiry here. An ancillary issue that might lead to those questions about bias or reveal information about that also can't be asked, and that is drilling down into the issue of his prior law enforcement career.

The only issue is why he didn't disclose it, not – this is not further *voir dire*. This is not the time to be asking questions, Well, what were your experiences when you were a former law enforcement officer? That gets to the issue of bias, which was addressed or raised only in deliberations, so it cannot be a subject of our conversations.

The only issue being why he didn't disclose it. And I tried to think of every question I could ask him, and every issue that might have been addressed either in the questionnaire or in direct questions to him. And the only ones that I found – after I went through this several times as far as going through the transcript – were this issue of the disclosure of friends and Judge Antrim's question about whether, quote, Are you or any member of your family or close acquaintance a law enforcement officer? That being a present tense question. And I actually ran this by Judge Antrim, and her [4] scripted question is not this question. Her scripted question is past or present, but that's not the question she actually asked, and that surprised her. But it is not the question she actually asked. So that's why I've phrased this in the way that I did.

I also went through and checked that other people in the panel talked about friends who had formerly been in law enforcement, even though they were not asked that question, and why that didn't trigger something. So that's why the questions are phrased in the way that they are.

So is there any question about that?

MR. MEYRICK: Yes, Your Honor. With respect to the Court's outline No. 3, where the juror was asked whether or not they had any kind of classes, if, in fact, he was a police officer, and you're prohibiting us from asking about his experiences there, if he went to the police academy and had criminal law, arrest, search and seizure law, and things of that nature. That, too, I would think, based on the fact that he's already been advised this is a critical case and he doesn't say anything about having criminal law classes, he limits his response to contract and real estate law, I think [5] that's relevant if, in fact, he was a police officer; if, in fact, he went to the academy, and so on and so forth, because that may indicate to the Court – or the Court could take some sort of inference from that that perhaps he didn't disclose something that would have been relevant at that point in time, and that that goes more to whether or not it was deliberate or –

THE COURT: I would be amenable to asking a question under No. 3, did he have any criminal law classes.

MR. MEYRICK: Okay.

THE COURT: Period.

MR. MEYRICK: That's fine.

THE COURT: Given the disclosure that he had other law classes.

MR. MEYRICK: And the only other thing I would say, we have been through this, the Court's ruled. I want to make the record clear that I do think that the remainder is relevant. I think it goes to demonstrate actual bias in the event that there's a finding that the disclosure was inadvertent, and that's my position on that.

THE COURT: I understand the position, but –

MR. MEYRICK: Thank you.

[6] THE COURT: – but I have made my ruling on that, and we will not go into it. It is preserved for appeal.

MR. MEYRICK: Thank you.

THE COURT: Mr. Edson.

MR. EDSON: Nothing additional, Judge.

THE COURT: All right.

And I'm going to swear him in. My guess, we will have to reset this for any other type of argument you want to make, simply because we are in the middle of a jury trial. We have to get this case to the jury. So I apologize for that. I wanted to get this at least out of the way so Mr. [C] does not need to be involved in this anymore.

(Mr. [C] present in the courtroom.)

THE COURT: Thank you, Mr. [C]. I know that you're not terribly pleased about being here.

Let me explain the circumstance. We need to ask you a few questions. I'm going to swear you in in order to answer those questions. And this concerns your being selected as a juror in this case, back whenever this was. Let me do that first.

[7] [H.C.], having been first duly sworn by the Court, testified as follows:

EXAMINATION

BY THE COURT:

Q. In your juror questionnaire – that's the original copy.

As you recall, this was case 07CR2311, the People versus Mr. Pena-Rodriguez.

During jury selection on this case, you filled out a written juror questionnaire before coming up to the courtroom for the *voir dire* or jury selection procedure.

Among other answers, you answered one particular question in the following manner: Question No. 8. It says simply, "Friends or relatives in law enforcement?" You put down, "Friends."

Also, after you came up to the courtroom, the entire jury panel was sworn by Judge Antrim in the next courtroom over, and the *voir dire* began.

During *voir dire*, you raised your hand to answer a general question asked by the Court as to whether any jurors – and the question was, "Have law classes of any kind?" You answered that you had real estate and contract law classes.

A. Correct.

[8] Q. And assured the Judge that you could put that knowledge aside for the trial. Do you recall that?

A. I do.

Q. Did you have, during your experience, any criminal law classes?

A. Not that I can think of. Real estate does not deal with criminal.

Q. All right. At one point, the Judge asked the entire panel, Are you or any member of your family or any close acquaintance a law enforcement officer?

Although you had indicated on your questionnaire that you did have friends who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond?

A. The only thing I can think of, my son's nephew by marriage is the only one I still know that's in law enforcement. He's an El Paso County deputy sheriff, so I have maybe contact with him once a year at family get – togethers.

Q. Other jurors also responded they had friends who were formerly in law enforcement. Why did you not inform the Court at that time that you had formerly been a law enforcement officer?

A. It was forty years ago. I don't recall it was a question about employment.

[9] Q. Do you recall the question?

A. No, I don't.

Q. You don't have any recollection of it at all?

A. Not that I can say specifically.

Q. Do you recall a general question that the Judge asked about, Are you or a member or any family or close acquaintance a law enforcement officer?

A. Off the top of my head, no, I can't specifically say.

Q. Did you make any decision not to inform the Court about your prior law enforcement service?

A. No. It was never pointedly asked me if I had been employed.

Q. When you say "not pointedly asked," the question was – taking out some of the language about friends or family – "are you a law enforcement officer?"

A. It was forty years ago, in the late '60s.

Q. Is that how you understood the question at the time?

A. It was friends or relatives currently. That's the way I had a recollection.

THE COURT: Mr. Edson?

MR. EDSON: Nothing additional.

THE COURT: Mr. Meyrick?

MR. MEYRICK: If could I have just a moment, [10] Your Honor.

THE COURT: Yes, you may.

MR. MEYRICK: If we could approach for a moment?

THE COURT: Yes, you may.

Mr. [C], I'll ask you to step out for a minute. We will get you right back.

(Mr. [C] left the courtroom.)

MR. MEYRICK: Your Honor, I don't want to go outside the Court's parameters here. That's why I didn't ask the question.

Do you think it would be prudent now to ask him, now that he said that he was a law enforcement officer, if he attended any academy law classes?

THE COURT: I can certainly ask him that again, now that he knows where we are going. I'll ask him that question.

MR. MEYRICK: Okay. That was where I was going about whether or not there was further nondisclosure about law classes.

THE COURT: Now I understand.

(Mr. [C] present in the courtroom.)

THE COURT: Thank you, sir.

It was kind of silly to have you in here when we were talking about a question we may or may not [11] ask. I am going to ask the question, though.

Now that I have indicated to you what the issue here is, and that is your prior law enforcement employment, I'm going to re-ask you the question. Perhaps this will jog your memory.

Do you recall having, in that experience of law enforcement employment, criminal law classes or criminal –

THE WITNESS: No.

THE COURT: Mr. Meyrick, anything further?

MR. MEYRICK: No, Your Honor.

THE COURT: Okay.

Thank you, Mr. [C], very much. You are released and we very much appreciate your coming in. (Mr. [C] left the courtroom.)

THE COURT: Okay. I think what is the appropriate way to handle this is if – Mr. Meyrick, if you and Ms. Cherry wish to supplement what you've already presented, I think that would be appropriate to do so in writing. If you wish to schedule it for a hearing, we will do that. If you wish to address it in writing – but the People need something to respond to.

MR. MEYRICK: Right.

THE COURT: I think that's the way –

[12] MR. MEYRICK: I'll write it.

THE COURT: Okay. What sort of time frame do you want to work with?

MR. MEYRICK: The next two weeks are very busy for me. Anything beyond that is fine.

THE COURT: Three weeks?

MR. MEYRICK: Friday, the 3rd? Thank you.

THE COURT: Thank you.

(The proceedings were concluded.)

ORDER – Re: Defendant's Motion for New Trial – Final Order

Having received the affidavits of the two female jurors who contacted Kelly C. Cherry, Esq., in accordance with the Court's April 28 and April 30, 2010 Orders, and having conducted a hearing with the subject juror on August 12, 2010, pursuant to the Court's Order at hearing on July 20, 2010, and having received "Defendant's Brief in Support of His Motion for New Trial," including the People's response, and otherwise being fully advised of the premise of the Motion, the Court issues the following ruling:

A. Factual Background.

1. The following scenario resulted in the jury's verdict against the defendant:

a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia*, the following question:

> 8. Friends or relatives in law enforcement? [Juror No. 11 answered, "Friends."]
>
> 17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? __If yes, please explain. [Juror No. 11 answered this question, "no."]

c. The jury venire was then sworn by the Court and *voir dire* began. During *voir dire*, the only individual question asked of Juror No. 11 was in response to a general question by the Court as to whether any of the jurors "had law classes of any kind?" Juror No. 11 stated "real estate and contract law," and assured the Judge that he could put that knowledge aside for the trial [Transcript at 21].

d. At the beginning of *voir dire*, the Judge inquired of the entire venire: "Do any of you have any feeling for or against the defendant or the Prosecution?" The Judge confirmed that no potential jurors raised their hands (including Juror No. 11).

e. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although several other jurors disclosed friends and/or acquaintances who are (and who had been) law enforcement officers, Juror No. 11 did not disclose any current or previous law enforcement service [Transcript at 29-30]. Further, notwithstanding his answer on the questionnaire to Question No. 8, Juror No. 11 did not raise his hand regarding this question.

f. Defense counsel inquired of the entire venire whether "this is simply not a good case for them to be a fair juror." No jurors (including Juror No. 11) made any response.

2. Based on the information sworn to by two deliberating jurors, the following statements were allegedly made by Juror No. 11 during deliberations:

a. The juror stated that, "I think he did it because he's Mexican and Mexican men take whatever they want."

b. The juror also made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

c. The juror made statements that the defendant was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.

d. The juror stated that, where he used to patrol, nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls.

e. The juror stated that he did not think the alibi witness was credible because, among other things, he was "an illegal."

3. On August 12, 2010, Juror No. 11 was sworn and testified as follows to questions asked by the Court (which had been presented to the parties in writing by the Court prior to the hearing). The following colloquy occurred between the Court and Juror No. 11:

BY THE COURT:

Q. In your juror questionnaire – that's the original copy. As you recall, this was case 07CR2311, the People versus Mr. Pena-Rodriguez. During jury selection on this case, you filled out a written juror questionnaire before coming up to the courtroom for the *voir dire* or jury selection procedure. Among other answers, you answered one particular question in the following manner: Question No. 8. It says simply, "Friends or relatives in law enforcement?" You put down, "Friends." Also, after you came up to the courtroom, the entire jury panel was sworn by Judge Antrim in the next courtroom over, and the *voir dire* began. During *voir dire*, you raised your hand to answer a general question asked by the Court as to whether any jurors – and the question was, "Have law classes of any kind?" You answered that you had real estate and contract law classes.

A. Correct.

Q. And assured the Judge that you could put that knowledge aside for the trial. Do you recall that?

A. I do.

Q. Did you have, during your experience, any criminal law classes? A. Not that I can think of. Real estate does not deal with criminal.

Q. All right. At one point, the Judge asked the entire panel, Are you or any member of your family or any close acquaintance a law enforcement officer? Although you had indicated on your questionnaire that you did have friends who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond?

A. The only thing I can think of, my son's nephew by marriage is the only one I still know that's in law enforcement. He's an El Paso County deputy sheriff, so I have maybe contact with him once a year at family get-togethers.

Q. Other jurors also responded they had friends who were formerly in law enforcement. Why did you not inform the Court at that time that you had formerly been a law enforcement officer?

A. It was forty years ago. I don't recall it was a question about employment.

Q. Do you recall the question?

A. No, I don't.

Q. You don't have any recollection of it at all?

A. Not that I can say specifically.

Q. Do you recall a general question that the Judge asked about, Are you or a member or any family or close acquaintance a law enforcement officer?

A. Off the top of my head, no, I can't specifically say.

Q. Did you make any decision not to inform the Court about your prior law enforcement service?

A. No. It was never pointedly asked me if I had been employed.

Q. When you say "not pointedly asked," the question was – taking out some of the language about friends or family – "are you a law enforcement officer?"

A. It was forty years ago, in the late '60s.

Q. Is that how you understood the question at the time?

A. It was friends or relatives currently. That's the way I had a recollection.

B. Standard of Review – Juror Bias.

4. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury

> renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra*.
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 83 P.3d 1130, 1136-1137 (Colo. App. 2003)(citations omitted).

> The jury selection process cannot uncover every possible influence that might theoretically affect a juror's consideration of a case. One of the purposes of written instructions of law is to offset possibly inappropriate considerations that might arise during the course of a trial by emphasizing the importance of fairness in the deliberative process.

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983).

"A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d at 895 (citation omitted).

5. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

6. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information.

> We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added). Consequently, whether or not all jurors unanimously agreed on their "guilty" verdict does not affect the Court's analysis of whether a juror intentionally or inadvertently concealed a bias toward the defendant, and if so, whether that action warrants a new trial.

C. Legal Analysis.

(1) Nondisclosure of biographical information.

7. Based on the answers provided by Juror No. 11 at the August 12, 2010, hearing and the written and oral responses by Juror No. 11 during *voir dire* on February 23, 2010, the Court has no factual basis to find that Juror No. 11 deliberately misrepresented or intentionally failed to disclose important information potentially relevant to a challenge for cause or a preemptory challenge regarding his prior law enforcement experience. *Black v. Waterman*, 83 P.3d at 1136.

a. Despite having law enforcement experience forty years prior, Juror No. 11 indicated that he had not had any criminal law classes or training.

b. Juror No. 11 had no specific recollection of the judge's question about being a law enforcement officer. As a general recollection, he did not recall that the question was inquiring about his employment status, and since he had not been a law enforcement officer for forty years, he did not understand that the question was asking for that employment information.

8. On the other hand, the Court does find that Judge Antrim's question as to whether any prospective juror was a law enforcement officer was clear enough (especially in the context of the answers provided by other jurors) to elicit a response from Juror No. 11 regarding his prior law enforcement experience, even though that experience was forty years earlier.

9. Therefore, the Court concludes that Juror No. 11 did fail to disclose his prior law enforcement experience, but that the disclosure was inadvertent due to his confusion regarding the nature of the question and the length of time since he had been a law enforcement officer.

10. Under the standard set forth in *Black v. Waterman and Dunoyair, supra*, the defendant "must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." *Black v. Waterman*, 83 P.3d at 1137.

11. As noted above, under C.R.E. 606(b), the *effect* of Juror No. 11's alleged bias during jury deliberations which apparently occurred in this case (i.e., Juror No. 11's reported statements about Mexican men and illegal aliens) is protected from consideration by the Court regarding the determination of whether actual bias resulted from the specific information inadvertently withheld by Juror No. 11. *People v. Harlan*, 8 P.3d at 460. However, in order to determine whether the bias alleged by the defendant is a component of the law enforcement experience which was inadvertently concealed during *voir dire*, the Court must consider the nature of Juror No. 11's offending conduct during deliberations. Upon examination, the alleged bias at issue during deliberations concerns negative impressions of Mexican men and illegal aliens.

12. On its face, Juror No. 11's law enforcement experience forty years earlier is not sufficient proof, standing alone, to create an actual bias by Juror No. 11 against the defendant regarding Mexican men and/or illegal aliens. Police officers are no more likely to have a bias against Mexican men and/or illegal aliens than any other demographic. The only way in which a relationship between Juror No. 11's former law enforcement experience and a bias against Mexican men and/or illegal aliens could have been established is through other questions during *voir dire* regarding such a bias.

13. Neither counsel nor Judge Antrim inquired directly and specifically about whether any juror had a bias against Mexican men or against illegal aliens. The Court will not speculate as to whether, if Juror No. 11 had revealed his law enforcement background, a logical follow-up question would have addressed any potential bias against Mexican men and/or illegal aliens. Such a question is more likely to have been asked of all prospective jurors, and not just of a juror who revealed past law enforcement experience. As noted, no such questions were asked of the venire.

14 Juror No. 11 (and all other prospective jurors) was asked the question in the written Juror Questionnaire, "Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?", and Juror No. 11 answered "no." Further, the Court instructed the jury prior to deliberations that "[n]either sympathy nor prejudice should influence your decision." [Jury Instruction No. 1]. In the absence of proof of the creation of actual bias through the inadvertent failure to disclose, the Court must presume that the jury followed its instructions. *Dunoyair*, 660 P.2d at 896.

15. Although the Court regrets that Juror No. 11 was reported to have made statements during jury deliberations which raise the issue of his bias against Mexican men and/or illegal aliens, the fact of those statements during deliberations cannot weigh in the determination of whether Juror No. 11 failed to disclose this alleged bias during voir dire. *People v. Harlan*, 8 P.3d at 460. The Court has no proof that Juror No. 11's inadvertent failure to disclose his prior law enforcement experience translates into a bias against Mexican men and/or illegal aliens.

16. Based on this legal and factual analysis, the Court DENIES the defendant's Motion for a new trial.

By Order of the Court this 30th day of September, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties